THE
UNIVERSITY OF CHICAGO LAW REVIEW
VOLUME 16 · WINTER 1949 · NUMBER 2

RACIAL RESTRICTIONS AND THE FOURTEENTH AMENDMENT: THE *RESTRICTIVE COVENANT* CASES

WILLIAM R. MING, JR.*

AFTER more than fifty years of litigation on the subject in federal and state courts, the Supreme Court at the last term held in the *Restrictive Covenant* cases that judicial enforcement of restrictions on the ownership and use of real property by Negroes, even though the limitations were imposed by the acts of private persons, violated the Constitution of the United States.[1]

The decisions terminated a kind of litigation which probably had attracted as much public attention and interest as any in our history. In October 1947 the Report of the President's Committee on Civil Rights

* Associate Professor of Law, University of Chicago Law School.

[1] Shelley v. Kraemer and McGhee v. Sipes, 334 U.S. 1 (1948); Hurd v. Hodge and Urciolo v. Hodge, 334 U.S. 24 (1948) arising in Missouri, Michigan, and the District of Columbia, respectively. Hereafter these cases will be referred to as the Restrictive Covenant cases.

The first reported case involving a limitation on the ownership or use of land in terms of who might own or use it rather than how it might be owned or used was Gandolfo v. Hartman, 49 Fed. 181 (C.C. Cal., 1892). There Judge Ross, donor of the prize for the American Bar Association Annual Essay Contest, held that judicial enforcement of such a limitation against Chinese would violate both the Fourteenth Amendment and the 1880 treaty between the United States and China. Prior to the instant cases this precedent was largely ignored; see Kraemer v. Shelley, 355 Mo. 814, 823, 198 S.W. 2d 679, 683 (1946).

The history of judicial enforcement of such restrictions has been exhaustively reviewed elsewhere and will not be repeated here. See Ming, Legal Disabilities Affecting Negroes, 8 Journ. of Negro Education 406 (1938); McGovney, Racial Segregation by State Court Enforcement of Restrictive Agreements, Covenants, or Conditions in Deeds Is Unconstitutional, 33 Calif. L. Rev. 5 (1945); and Miller, Race Restrictions on Ownership or Occupancy of Land, 7 Lawyers Guild Rev. 99 (1947). Suffice it to say that reported appellate decisions show that at least sixteen states and the District of Columbia provided judicial enforcement for restrictions on occupancy by particular racial, religious, and national groups, ten of these jurisdictions also enforcing restrictions on ownership. In the latter group were Missouri, Louisiana, Colorado, Kansas, Oklahoma, Georgia, Kentucky, New Jersey, Illinois, and the District of Columbia. "Use" restrictions alone were enforced in California, Michigan, Ohio, Maryland, West Virginia, Wisconsin, and North Carolina. It is significant that most of these states were northern or "border" states.

had roundly denounced judicial enforcement of these agreements.[2] In recent years each opinion of an appellate court enforcing such a limitation was the subject of one or more law review notes, usually critical of the result.[3] Even action by trial courts in these cases was usually reported by the wire services, and the stories published in newspapers throughout the country.

An ever increasing number of such cases had intensified public interest. At the time the Supreme Court acted, there was a substantial number of these cases pending throughout the country, although no accurate data are available to show how many there were. It is estimated that about thirty were pending in California, several awaiting decision by the supreme court of that state. Nearly that many were on the dockets in Illinois, most of them involving Chicago property. In one case a substantial amount of sociological and economic data on the effect of residential segregation in the city had been offered to the trial court to support the attack on judicial enforcement of restrictive covenants,[4] and by agreement of counsel the other cases had been continued until the "test case" should be decided. In addition a number of covenant cases were pending in Missouri, Michigan, Ohio, and the District of Columbia.[5]

When the Supreme Court granted certiorari in two state and two District of Columbia cases, the litigation before the Court became the focal point of nation-wide interest. Twenty-three briefs on behalf of amici

[2] "To strengthen the right of equality of opportunity, the President's Committee recommends: The enactment by the states of laws outlawing restrictive covenants; renewed court attack, with intervention by the Department of Justice, upon restrictive covenants. The effectiveness of restrictive covenants depends in the last analysis on court orders enforcing the private agreement. The power of the state is thus utilized to bolster discriminatory practices. The Committee believes that every effort must be made to prevent this abuse. We would hold this belief under any circumstances; under present conditions when severe housing shortages are already causing hardship for many people of the country, we are especially emphatic in recommending measures to alleviate the situation."

[3] See, for example, Mays v. Burgess, 147 F. 2d 869 (App. D.C., 1945), noted critically in 40 Ill. L. Rev. 432 (1946); 59 Harv. L. Rev. 293 (1946); 18 Rocky Mt. L. Rev. 148 (1946).

[4] Tovey v. Levy, Case No. 45-S-947, Superior Court of Cook County, Ill. A decree enforcing the restriction was set aside by the Illinois Supreme Court on the authority of the instant cases. 401 Ill. 393, 81 N.E. 2d 441 (1948).

[5] In fact, just after certiorari had been granted in Hurd v. Hodge, 332 U.S. 789 (1948), the Supreme Court was asked to review a decision by an Ohio court that the minister of a church could not occupy the parsonage because he was a Negro. The sometimes curious legal differentiation between artificial corporate persons and natural persons permitted the congregation, although they were all Negroes, to use the church in the same area because title was in a religious corporation, which has no "race." See Peoples Pleasure Park v. Rohleder, 109 Va. 439, 61 S.E. 794 (1908). The Supreme Court reversed the Ohio ruling without argument on the authority of the instant cases. Trustees of Monroe Ave. Church v. Perkins, 334 U.S. 813 (1948); opinion below, 147 Ohio St. 537, 72 N.E. 2d 97 (1947).

curiae were filed with the Court,[6] one of them by the Attorney General of the United States, urging that judicial enforcement of these restrictions violated the constitutional limitations on the power of the several states and the federal government. The Solicitor General appeared to present the government's views orally.

During the two days of oral argument before the Supreme Court the courtroom was packed. Hundreds of persons queued up in the marble corridors waiting patiently in the hope of being admitted to the few seats available to the public after provisions had been made for counsel, members of the bar, the press, and guests of the court. All the press wire services and all the daily papers which maintain Washington bureaus covered the arguments, and at least two embassies had "official observers" busily engaged in note-taking. The oral arguments were front-page news in many of the urban centers of the country. They were the subject of feature articles, editorials, and discussion by columnists in many newspapers, and it was obvious to all observers that both the Court and counsel were deeply conscious of their respective roles in the determination of this major constitutional issue. Interestingly enough, the sometimes quaint ritualism of the legal process only served to accentuate this fact.[7]

It was nearly four months after argument that the opinions were announced.[8] The decisions were immediately and generally hailed as a victory for equal rights of racial minorities and were regarded as likely to be far-reaching in their effects and "to serve to extend social and economic

[6] Briefs amicus in support of the petitioners' position were filed on behalf of the Human Relations Commission of the Protestant Council of the City of New York, American Association for the United Nations, the Congregational Christian Churches of the United States, the American Jewish Committee and B'nai B'rith, National Bar Association, National Lawyers Guild, American Civil Liberties Union, Congress of Industrial Organizations, American Federation of Labor, American Jewish Congress, American Indian Citizens League, American Veterans Committee, Japanese American Citizens League, Non-Sectarian Anti-Nazi League, Civil Liberties Department of the Grand Lodge of Elks, Attorney General of the United States, and certain citizens of California.

Briefs amicus in support of the respondent's position were filed on behalf of Mount Royal Protective Association, Inc., Arlington Heights Property Owners Association et al., Federation of Citizens Associations of the District of Columbia, Inc., et al., and the National Association of Real Estate Boards.

[7] Three members of the court, Justices Reed, Jackson, and Rutledge, withdrew from the bench prior to the argument and did not participate in the decisions. Only Justice Reed did not participate in the decision to review the state cases, Shelley v. Kraemer, 331 U.S. 803 (1947); McGhee v. Sipes, 331 U.S. 804 (1947). No official reason has been given for the withdrawal of these justices. It was widely rumored, of course, that the withdrawals were due to the fact that each was the owner of property subject to a similar limitation. See, for example, The London Economist 183 (July 31, 1948).

[8] Oral arguments were heard January 22 and 23, 1948. The opinions were announced May 3, 1948.

justice."[9] Some fears were expressed by the more timorous that in the absence of judicial enforcement for restrictive covenants violence would be resorted to as a means of enforcing residential segregation.[10] "Expert" predictions by real estate brokers, social workers, leaders of reform organizations, and others were quoted as to the probable effects of the decisions, but in most cases these were no more than reaffirmations of opinions expressed prior to the cases. The Court was not without critics, of course, both as to the end result and as to the "extension" of limitations on the authority of the several states.

Professor John Frank, in reviewing the work of the Court during the term, called the decisions "the most important of the year in terms of legal theory," but added immediately that "[p]aradoxically their practical consequence in the immediately foreseeable future will be small."[11] Doctor Robert C. Weaver, in an exhaustive survey of residential segregation of Negroes in the North, completed just prior to the opinions in the *Restrictive Covenant* cases, titled one chapter "The Villain—Racial Covenants."[12] Although he said, "These agreements have become the symbol and most popular instrument of those who would initiate or entrench residential segregation,"[13] his whole treatment of the subject leaves no doubt that in his opinion restrictive covenants are not the only "villain" in the piece.[14]

But the pressures to maintain and the counter-pressures to destroy residential segregation were at least sharply manifested in the restrictive covenant litigation. The covenants are directed primarily at Negroes, but they affect other groups as well,[15] and they have been formidable devices for maintenance of the "walls" around the ghettos. Residential segregation raises profound problems with respect to both the housing of the national community and the status assigned to minority groups by our po-

[9] St. Louis Post Dispatch, p. 28, col. 2 (May 4, 1948); see Chicago Daily News, p. 20, col. 2 (May 5, 1948); and New York Herald-Tribune, p. 22, col. 1 (May 4, 1948).

[10] See Chicago Daily Tribune, p. 10, col. 2 (May 8, 1948).

[11] Frank, The United States Supreme Court: 1947–48, 16 Univ. Chi. L. Rev. 1, 22 (1948).

[12] Weaver, The Negro Ghetto 231–56 (1948).

[13] Ibid., at 231.

[14] See particularly ibid., at 211.

[15] "Although race restrictive housing covenants are aimed primarily at Negro Americans, they are by no means limited to this group of citizens. Most racial covenants include all non-Caucasians; some specify Negroes, Mexicans, Spanish Americans, and Orientals. Some include Jews. A few include Armenians, Hindus, Syrians, or former residents of the Turkish Empire. There is, obviously, no limit to their inclusiveness, save that of the current state of group prejudice. Recently international relations have influenced the application of these compacts in certain sections of the nation. In California, for example, the lower courts have refused to enforce racial covenants against Mexicans because such action is 'contrary to the Good Neighbor policy,' at the same time that covenants specifying 'persons whose blood is not entirely of the white race' have been interpreted to include American Indians." Ibid., at 232.

litical and social institutions. The *Restrictive Covenant* cases therefore presented major social issues and gave the Supreme Court an opportunity to aid in their solution. Since there is a growing public and professional interest in the role of legal institutions in the solution of contemporary social problems, the Court's decisions should be evaluated in terms of their effect on residential segregation and the constitutional theories with respect to protections afforded to members of minority groups.

To begin with, it must be recognized that in practically all cities and towns in the United States, Negroes may live only in one or more small areas comparable only to the ghettos of Central Europe. This segregation is practiced in the North as well as in the South and applies with as much force to long-time Negro residents of any community as to the most recent arrivals.

The reasons for this residential segregation have been discussed for many years. Its apologists have pointed to the physical characteristics of the slum housing usually allocated to Negroes and some other minority groups and have sought to justify residential segregation on the ground that it is necessary to protect other areas in the same community from the blight which poisons these ghettos.

Opponents of such residential segregation have attacked it on several grounds. They have successfully contended that such segregation by legislative fiat contravenes the Fourteenth Amendment,[16] but their success in this direction has not eliminated these ghettos. Rather, since the decision in *Buchanan v. Warley*, the number of persons so confined has increased by leaps and bounds as two major wartime migrations drew Negro agricultural workers from the cotton fields of the South to the foundries, packing plants, and mills of the North.[17]

Residential segregation has been condemned on the ground that ghettos have been established by various communities on the basis of conditions and population at a particular time, usually many years past, and no adjustment has been made for population changes or changes in economic and social conditions. As a result these ghettos have become over-

[16] Buchanan v. Warley, 245 U.S. 60 (1917); Richmond v. Deans, 281 U.S. 704 (1930); Harmon v. Tyler, 273 U.S. 668 (1927).

[17] See, for example, current census estimates showing that between 1940 and 1947 more than a million non-white persons, or 9.5 per cent of the total number of such persons, moved to noncontiguous states while only 5.7 per cent of the total number of whites moved to noncontinguous states. The comparable percentages for the period 1935–40, however, were 1.9 per cent and 2.9 per cent, respectively. Current Population Reports, Population Characteristics, P-20, Bureau of the Census (1948). As to increases in Negro populations in major urban centers in the North, East, and West between 1910 and 1947, see Weaver, op. cit. supra note 12, at 49; Current Population Reports, Population Characteristics, P-21, Bureau of the Census (1947).

crowded and congested to an almost unbelievable degree.[18] The dire effects of such overcrowding and congestion have been established by inspection and analysis of their impact on birth rates, death rates, incidence of diseases (particularly of the pulmonary type), crime, vice, juvenile delinquency, and the mental health of the people in these slums. The inequality of opportunity for the segregated minority thus effected has been bitterly decried on social, economic, and political grounds. Because Ne-

[18] For example, a report by the Illinois State Board and the Regional Board of the National Housing Agency said of conditions in Chicago:

"Prior to World War I, Negroes were fairly widely distributed throughout the city, but with the influx of 50,000 Negroes from the South between 1916 and 1920 a 'tightening-up process' began, which eventually confined them largely to an area of 4.2 square miles, known as 'The Black Belt' or 'The South Side.' In 1939 this area contained 252,201 persons, of which 87,300 were estimated to be excess population. The balance of the total Negro population of 277,000 in 1946 lived mostly in a half dozen small areas. It is estimated by the Chicago Plan Commission that the Negro population has increased by 75,000 to a present total of about 350,000 persons. It may be assumed that most of the 75,000 persons reside in 'The Black Belt' where in 1940 it was estimated that the population was 83,000 persons in excess of accommodations. Restrictive covenants and intimidation of the Negro has limited protrusions from 'The Black Belt' to insignificant proportions since 1940.

"According to January, 1945, estimates of the Chicago Housing Authority, 20,812 units were then required to relieve Negro overcrowding. Replacing the approximate 44,000 substandard dwellings occupied by Negroes is another problem. To the families overcrowded in 1945 must be added the Negro veterans who have returned to compete for housing for their united and newly created families. In January of 1946 the Chicago Housing Authority reported that of the 32,500 veterans' families then in distress because of inadequate housing facilities, 14,500 were Negroes."

The non-white population of the Chicago metropolitan area increased from 330,000 to 447,000 persons between 1940 and 1947. Current Population Reports, P-21, No. 29, Bureau of the Census (1947). This population increase of approximately 36 per cent occurred while the white population increased by less than 1 per cent. The number of dwellings occupied by non-whites increased 27 per cent from 87,700 to 111,300. In other words, there was a net increase of one dwelling occupied for each additional five non-white persons since 1940. The corresponding figure for the white population of metropolitan Chicago was two and one-half dwellings for each additional person.

In 1940 only 30 per cent of dwelling units occupied by non-whites had five or more rooms. In 1947 more than 45 per cent of the dwellings of non-whites had five or more rooms. A rough index of crowding is obtained by dividing the median number of persons per occupied dwelling by the median number of rooms in occupied dwellings. Such an index for white and non-white families not only points up the racial disparity but also evidences a decrease in crowding among non-whites since 1940. On this basis the crowding index for white families dropped from 67 to 64 and for non-whites from 84 to 77.

The disparity in the amount of overcrowding among racial groups is more clearly portrayed, however, in the percentage of households containing more than one and one-half persons per room. Among white households this percentage was 4 in 1940, and 2 in 1947, but among the non-white households 18 per cent were more crowded than one and one-half persons to the room in 1940, and in 1947 the percentage was 13.

The discrepancy between whites and non-whites is also shown by the proportion of dwellings which need major repair or which lack toilet and bath. In 1940, 55 per cent of the non-white housing in metropolitan Chicago was substandard in these terms. In 1947, 34 per cent were still substandard. Among the dwellings occupied by white families, 19 per cent were substandard in 1940 and only 10 per cent in 1947. 1947 data from Current Population Report, P-71, No. 29, Bureau of the Census (1947). 1940 data from 16th Census of the United States (1940), Housing, Vol. II, General Characteristics, Part 2, at 763 et seq.

groes and whites do not live in the same communities they cannot, even if they would, cooperate, in the innumerable activities which are based on a common neighborhood. Residential segregation represents a major limitation on the market in housing, thus subjecting Negroes to an "artificial" scarcity whenever there is an increase in the demand for housing among Negroes whether it be due to an improvement in economic conditions affecting them or an increase in the number of Negroes in the particular area. Finally, it is argued that residential segregation does violence to the basic concepts of equality which underlie our social and political institutions.

The apologists for residential segregation have insisted that it was based on the decisions of individual owners as to the best use of their own property and that the unfortunate results were thus entirely "legal."[19] Actually, however, the structure of the walls around these ghettos is not so simple. They are built of a complex of social, psychological, economic, and political factors which both form the basis for, and are themselves the result of, prevailing color-caste attitudes in the community.[20] Their foundation is one of legal principles originating in the destruction of feudalism and developed to maximize the control of an owner over his real property.[21] Thus the ignorance, prejudices, fears, cupidity, and desire for power

[19] See Bowman, The Constitution and Common Law Restraints on Alienation, 8 B.U.L. Rev. 1 (1920); Bruce, Racial Zoning by Private Contract in the Light of the Constitution and the Rule against Restraints on Alienation, 21 Ill. L. Rev. 704 (1927); cf. Rest., Property § 406, Comment (1944).

[20] See Myrdal, An American Dilemma 50–82, 618–22 (1944).

[21] After the statute of Quia Emptores, it was well settled at common law that complete limitation on the alienation of real property was void as inconsistent with the fee. Tiffany, Real Property § 1345 (3d ed., 1939). It was thought, however, that a restraint on alienation to a particular person or class of persons was valid. Bracton recognized the legality of such restraints and used the following illustration: "Likewise, a donation may be made to men under religious vows as well as to others to whom gifts may be made. Likewise to Jews, as well as to Christians unless the mode of donation imposes the contrary, namely, that it is permissible to the donatory to give or sell the thing to him to whomsoever he will, except to persons under religious vows and to Jews and to such persons he cannot give it as to others, neither reason nor necessity imports except the mode of donation alone." Bracton, lib. 2, c. 5, foll. 13.

At law an agreement by the owner in fee to limit the use of his land was enforceable only as between the original promisor or promisee as a personal contract. Neither the benefit nor the burden of such limitation was binding on subsequent purchasers either with or without notice of the limitation. In England the only exception to this general rule was found in the case of limitations imposed by a lessor against a lessee, which were held to bind sub-lessees as well as to operate for the benefit of assignees of the original lessor. Cheshire, Modern Law of Real Property 295–96 (1937). In the majority of American jurisdictions, however, covenants with regard to the use of land "run with the land" if there is a privity of estate as defined by the local law. Clark, Real Covenants and Other Interests Which "Run with Land" (2d ed., 1947); Tiffany, Law of Real Property, c. vi, §§ 848–57 (2d ed., 1920); see also Rest., Property § 535 (1944). The controversy among the legal scholars in this field with respect to the meaning of the requirement of "privity of estate" appears not to be material here, since

of many individuals result in the members of minority groups being denied access to the market in real property except in the few areas abandoned to their use.

Restrictive covenants did not beget residential segregation. They are the device used by property owners and groups of neighboring landowners in an effort to bind owners of adjacent property to maintain restrictions on minorities. No entirely reliable data are available as to the extent of their use, but it seems safe to conclude that they are widely employed to surround the islands of minority occupancy and to blanket suburban developments.[22]

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the equitable enforcement of such limitation appears to make the issue with respect to actions at law academic. See Tiffany, supra, at § 851 and Clark, supra, at 92, 111–43, and App. I for a discussion of the controversy.

Both English and American writers agree that urban developments and the desire of city residents to secure desirable residential surroundings demonstrated that the common-law rules as to limitations on the use of land did not satisfy modern needs. Clark, supra, at 170; Cheshire, supra, at 297. To fill the breach, the courts of equity stepped in about one hundred years ago to enforce both the benefit and the burden of restrictions on the use of land against subsequent grantees of the respective estates. The leading case is Tulk v. Moxhay, 2 Phil. 774 (Ch., 1848). Significantly, the limitation which the court enforced in that case was one aimed at maintaining a garden and pleasure ground in London where the original grantor in fee had retained title to several adjacent houses.

The original basis for the equitable rule was the doctrine of notice. It has been observed that the court of equity, as a "court of conscience," would not permit a grantee of land to disregard a limitation with respect to the use of the particular land if the grantee had clear notice of the limitation at the time of acquiring his interest in the land. Behan, Covenants Affecting Land 27 et seq. (1924). This is the prevailing English view of the basis for equitable intervention against the assignees of the convenantor's estate for the benefit of the covenantee's estate. A number of American jurisdictions have also justified the same result on the theory of a creation of an equitable easement. Tiffany, supra, at § 861, points to the difficulties involved in a theory which creates an "equitable easement" out of what in a court of law is only a contract. Tiffany urges as the more satisfactory theory that equity regard restrictive agreements as contracts enforceable by injunction or otherwise. Such agreements would then be enforceable only against subsequent takers with notice on two theories: the refusal of courts of equity to provide specific performance of contracts with respect to personal property against bona fide purchasers, and the analogous doctrine with respect to the enforcement of trusts against purchasers from trustees without notice.

The legal history of these restrictions on the use of property is significant to show that they were developed to benefit the owners of surrrounding premises by preventing particular uses of land. Innumerable illustrations show that these limitations were an early effort to improve urban residential areas by preventing uses believed deleterious to the fullest enjoyment of of residential property. For example, these agreements covered prohibitions of particular businesses, various kinds of buildings to be used as mercantile or manufacturing premises, building-line restrictions, limits to the width of driveways, and regulation of the grading of property. Tiffany, supra, at § 859. Except in the case of the racial and religious restrictions, however, these limitations were directed at the use to which the property might be put, not against the persons who might use the property. This distinction brings sharply into focus the highly material fact that these racial and religious limitations are entirely dependent for their existence upon a desire to improve the residential use of particular property by excluding certain persons from the surrounding area in the belief, mistaken or not, that residential purposes are better served by such a limitation.

[22] There is no uniformity in the extent to which such restrictions are in use in various cities. Weaver, op. cit. supra note 12, at 212–14, 236, 245–49. Estimates of the residential area in

It was the judicial enforcement of these limitations which made them such an effective device for the maintenance of residential segregation. Once a restrictive covenant was signed or included in a deed and recorded, the state courts stood ready to apply the power of the state to enforce the limitation throughout its term no matter what the present owner, other owners in the neighborhood, or the whole community might regard as the most desirable use of the property.[21] Thus the property covered was insulated by the state itself against the effect of economic and social changes in the community involving racial or religious minorities.

One of the harsh realities of residential segregation is that it draws rigid lines allowing few if any exceptions for economic, cultural, or other differences among individuals identified with the proscribed group. Since such differences inevitably exist, more and more individual Negro families, impelled by a desire to improve their housing and to escape the effects of slum life, endeavored to utilize their economic resources for this purpose. And with a general improvement in economic conditions, the number of such persons seeking to break through the walls of the ghettoes increased.

Most of the urban areas allotted to Negroes lie near to the centers of cities, and the buildings are the oldest and least desirable in the community. The areas immediately adjacent are frequently only slightly less unattractive. Thus their white occupants, as their economic condition improves, frequently are anxious to join the now familiar exodus of the city dwellers to the suburbs. The housing units which they leave become the goals of Negroes seeking some relief, even if slight, from the squalor and misery of the areas they occupy. The restrictive covenants were a "legal"

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particular cities such as Los Angeles and Chicago covered by such restrictions have ranged as high as 80 per cent of the total. Weaver is critical of this figure as applied to Chicago, but a partial study of tract books made for the record in Tovey v. Levy, No. 45-S-947, Superior Court of Cook County, Ill., showed clearly that the areas presently occupied by Negroes in Chicago were ringed by such limitations. See Weaver, op. cit. supra note 12, at 247–48 for a chart constructed from the data obtained in that study.

[21] The single exception was found in the "change of neighborhood" rule; see Hundley v. Gorewitz, 132 F. 2d 23 (App. D.C., 1942). The basis for this rule was that the purpose of the covenant could not be served if Negroes, despite the limitation, had already occupied some substantial part of the area covered. Equity would not enforce the burden to the detriment of the other owners, who would be denied the opportunity to sell to Negro purchasers by court order and at the same time limited in their access to white buyers by the presence of Negroes in the neighborhood. Edgerton, J., dissenting in Hurd v. Hodge, 162 F. 2d 233, 235 (App. D.C., 1947), pointed out that the evidence showed that Negroes lived in the area and that other Negroes would pay more for the property than whites. Therefore, he contended, enforcement of the covenant would defeat its economic purpose of supporting property values. This "economic purpose" has always presented a basic inconsistency in enforcement of these limitations. Restriction of the buyer group usually operates to the detriment of a seller. If it did not here, the only explanation would be that eligible buyers paid not only for the property but also for the monopoly which the limitation provided.

barrier to their efforts to improve their conditions. But the mere existence of such agreements, as these cases themselves show, did not operate to prevent willing white sellers from passing title or occupancy or both to willing Negro purchasers. As has already been pointed out, recourse to the courts was frequently necessary to shore up the walls around the ghettos.

It was out of this combination of circumstances that the *Restrictive Covenant* cases arose. But the court apparently limited its consideration to a few simple facts.[24] In *Shelley v. Kraemer*[25] the Court observed only that in 1911 thirty out of a total of thirty-nine owners of property in one block on both sides of a street in St. Louis had signed an agreement providing that the property was not to be used or occupied for fifty years by persons of the Negro or Mongolian races. These thirty owners of property held title to forty-seven of fifty-seven parcels of land in the area described in the agreement.[26] In 1945 the petitioners, Negroes, purchased certain premises in the area and accepted a warranty deed in fee with no actual knowledge of the restrictive agreement. They were, however, charged with constructive notice, since the agreement had been recorded. Two months later the respondents, as other owners of property subject to the restriction, brought suit seeking to divest the petitioners of title and to restrain them from taking possession of the property. The trial court denied relief

[24] In their briefs counsel for petitioners had included a considerable amount of data on the extent and effects of residential segregation of Negroes. This material was accumulated from a number of published sources, including reports of various federal and local government agencies such as the Bureau of the Census, Population Series, and "The People of Detroit," a report of the Detroit Planning Commission, as well as various sociological and public health studies. For a list including those from which materials were taken as well as others, see Weaver, op. cit. supra note 12, at 371–75. Dr. Weaver, with Miss Annette Peyser of the staff of the National Association for the Advancement of Colored People, was responsible for the collection of materials used in the briefs. This combination of the skills of lawyers and social scientists in preparation of briefs and materials for the record, as distinguished from the use of "expert witnesses," offers innumerable possibilities for use in litigation of broad public importance. Development of the practice, however, requires members in each professional group who are familiar with both the extent and the limitations of the material and techniques available to the other. Further consideration and study of the possibilities of such combinations, as well as others, would appear to be warranted.

Though much of the material dealt with the cities of St. Louis, Detroit, and Washington, D.C., specifically, it was not limited to those cities. The effort was rather to present, insofar as published material was available, the then existing Negro housing conditions in northern and border communities. Little if any of this material had been presented to the courts below, though some references had been made in briefs and arguments to general conditions. There is no expression in the opinion of the Supreme Court as to the weight given this material in the state cases. During the course of oral argument, Justice Frankfurter expressed a serious doubt as to its relevancy in those cases, though he conceded its relevancy in the District of Columbia case, apparently on the theory that it was material to a determination of the propriety of equitable relief in that case. See Frankfurter, J., concurring, Hurd v. Hodge, 334 U.S. 24, 36 (1948).

[25] 334 U.S. 1 (1948).

[26] At the time the agreement was signed, five of the parcels in the district were owned by Negroes and the other five were also occupied by Negroes for long periods thereafter.

on the ground that the restrictive agreement had never become effective, since it was intended that it should be signed by all the owners in the district.[27] On appeal this ruling was reversed and the relief sought ordered.[28]

The Michigan case involved a 1934 agreement among owners of certain Detroit property providing that it should not be used or occupied by any persons except those of the Caucasian race until 1960. The agreement further provided that it should not become effective until 80 per cent of the property fronting on both sides of the street in the block was similarly restricted. It too was recorded. Here, however, the percentage condition precedent to the effectiveness of the agreement had been met. The petitioners, Negroes, acquired title to one house in the block and moved in late in November 1944. Suit was brought in January 1945 in the state court for a decree requiring them to move from the property. Such a decree was entered and subsequently upheld in the Michigan Supreme Court.[29]

In the District of Columbia cases, twenty of thirty-one lots in a block on one side of the street had been sold in 1906 subject to a limitation in each of the respective deeds that the lot should never be "rented, leased, sold, transferred or conveyed unto any Negro or any colored person under a penalty of $2,000 which shall be a lien against said property." The remaining eleven lots in the same block not subject to such a restriction were found by the district court to have been occupied by Negroes for at least twenty years prior to the beginning of the litigation. The instant cases involved seven of the twenty lots subject to the restriction. They had been purchased from white owners either by Negroes or by white real estate dealers who had resold to Negroes. On the application of adjacent property owners the court had set aside the deeds to the Negro petitioners and ordered those who had moved into the property to leave within sixty days.[30]

The cases thus involved the common legal devices which had been used in the past to impose restrictions on the use and ownership of real property[31] by particular racial, religious, and national groups: agreements,

[27] Compare Hansberry v. Lee, 311 U.S. 32 (1940). Subsequent to the Supreme Court decision the Circuit Court of Cook County held the restrictive covenant in the Hansberry case unenforceable on the ground that the requisite number of signatures had not been obtained.

[28] It should be immediately apparent that the limitation in the Missouri case covered only use and occupancy and did not affect the right of petitioners to acquire title. The Missouri Supreme Court, however, drew no such distinction. Kraemer v. Shelley, 355 Mo. 814, 198 S.W. 2d 679 (1946).

[29] Sipes v. McGhee, 316 Mich. 614, 25 N.W. 2d 638 (1947).

[30] Hurd v. Hodge, 162 F. 2d 233 (App. D.C., 1947).

[31] Monchow, The Use of Deed Restrictions in Subdivision Development (1928).

running either perpetually or for a specified period, between persons holding title to particular parcels of land; or imposition of such a limitation by the owner of a number of parcels in deeds transferring each of the parcels to different grantees. Moreover, these cases involved both actual and constructive notice of such limitations to the persons who were sought to be charged with their burden. Since it had both state and federal cases before it, the Court was presented with the rare opportunity to dispose of a major legal issue in one set of opinions. Even more important, the Court seized on that opportunity to end judicial enforcement of racial restrictions.

The reasoning of the Court in disposing of the cases was precise. In those cases coming from the state courts, the Court denied that it had ever decided that judicial enforcement of these restrictions was consistent with the requirements of the federal Constitution.[32] The Court pointed out that it had been long recognized that action by a state court was "state action" subject to the limitations of the Fourteenth Amendment.[33] Precedents were noted in which these limitations had been applied to substantive common-law rules formulated by the state courts[34] as well as to state court procedure.[35] The Court observed that it was the decrees of the state courts, and only those decrees, which denied the petitioners the use and occupancy; and it recognized the obvious, that these decrees had been entered only because the property owners were Negroes. The Court concluded rightly, therefore, that the petitioners had been denied the equal protection of the laws guaranteed them by the Fourteenth Amendment, reminding the states that one of the primary purposes of that Amendment was to make certain "that all persons, whether colored or white, shall stand equal before the laws of the state, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination be made against them by law because of their color."[36]

[32] Defenders of restrictive covenants, and the state and federal courts in enforcing them, had customarily relied on Corrigan v. Buckley, 271 U.S. 323 (1926), in which the Court had upheld enforcement of such a covenant in the District of Columbia. In the instant cases that decision was distinguished on the grounds that the Court had considered only the constitutionality of the agreement itself and that the constitutional issue presented by judicial enforcement had not been raised in the court below and was not before the Court on appeal. Shelley v. Kraemer, 334 U.S. 1, 8–9 (1948); see Miller, op cit. supra note 1, at 103. In view of the blunt declaration in the earlier opinion that this constitutional contention "is lacking in substance," an interesting question arises as to the line between decision and dicta. On opposite sides on this question see Oliphant, A Return to Stare Decisis, 14 A.B.A.J. 71 (1928) and Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L. J. 161 (1930). In any event the decision here effectively silenced the Corrigan case.

[33] See Shelley v. Kraemer, 334 U.S. 1, 14 (1948), and cases there cited.

[34] Ibid., at 17–18, and cases there cited. [35] Ibid., at 16–17.

[36] Strauder v. West Virginia, 100 U.S. 303, 307 (1880). The petitioners had also attacked the

In the District of Columbia case, though petitioners had urged that the Fifth Amendment afforded them the same protection provided by the Fourteenth Amendment, the Court found it unnecessary to resolve that constitutional issue. Instead it pointed to a simple provision of the Civil Rights Act of 1868 that "[a]ll citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property,"[17] and held that the Act prohibited judicial enforcement of restrictive covenants by the courts of the District of Columbia. Even in the absence of this statute, said the Court:

> It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws. We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States.[18]

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decisions of the state courts on the grounds that they resulted in a denial to petitioners of privileges and immunities of citizens of the United States, deprived them of property without due process of law, and were inconsistent with treaties to which the United States was a party, particularly the Charter of the United Nations, 59 Stat. 1033, approved as a treaty by the Senate July 28, 1945, 59 Stat. 1213. The Court found it unnecessary to pass on these contentions. For discussions of these various arguments, in addition to the materials cited note 1 supra, see Martin, Segregation of Residences of Negroes, 32 Mich. L. Rev. 721, 734–41 (1934); Kahen, Validity of Anti-Negro Restrictive Covenants, 12 Univ. Chi. L. Rev. 198, 210 (1945); Hale, Rights under the Fourteenth and Fifteenth Amendments against Injuries Inflicted by Private Individuals, 6 Lawyers Guild Rev. 627 (1946); Jones, Legality of Race Restrictive Covenants, 4 Nat. B. J. 14, 16 (1946); Current Legal Attacks on Racial Restrictive Covenants, 14 Univ. Chi. L. Rev. 193, 199 (1947); Judicial Enforcement of Restrictive Covenants against Negroes, 40 Ill. L. Rev. 432, 433 (1946); Tefft, Marsh v. Alabama—A Suggestion Concerning Racial Restrictive Covenants, 4 Nat. B.J. 133 (1944). The purported violation of the due process clause of the Fourteenth Amendment was usually thought to merge in the equal protection clause, but for a brief discussion of the covenants as violations specifically of the due process clause see Miller, op. cit. supra note 1, at 106. For a discussion of the covenants as in violation of public policy as expressed in the United Nations Charter see Jones, Legality of Race Restrictive Housing Covenants, supra, at 26–29 (1946); Anti-Discrimination Legislation and International Declarations as Evidence of Public Policy against Restrictive Covenants, 13 Univ. Chi. L. Rev. 477 (1946). In his dissenting opinions in Mays v. Burgess, 147 F. 2d 869, 873, 876 (App. D.C., 1945), and in Hurd v. Hodge, 162 F. 2d 233, 235 (App. D.C., 1947), Justice Edgerton was of the opinion that the covenants were against public policy and therefore void. See also In Re Drummond Wren, 4 D.L.R. 674 (High Ct. of Ontario, 1945). For additional bibliography and a classification according to grounds of attack upon the covenants see Current Legal Attacks on Racial Restrictive Covenants, 14 Univ. Chi. L. Rev. 193 (1947).

[17] U.S. Rev. Stat. § 1978 (1870), 8 U.S.C.A. § 41 (1942); see Hurd v. Hodge, 334 U.S. 24, 32–33 (1948), for a history of this act.

[18] Hurd v. Hodge, 334 U.S. 24, 35–36 (1948). In a one-paragraph concurring opinion, Justice Frankfurter pointed out that respondent had sought "equity." He observed that "equity is rooted in conscience" and stated that the Court's result was sufficiently justified by the fact that it could not be the "exercise of a sound judicial discretion" to afford the relief which the trial courts had provided. Ibid., at 36.

The major thrust of the Court's decisions is aimed at prohibition of judicial participation in the maintenance of residential segregation. Thus these decisions appear to eliminate the possibility of judicial enforcement of restrictions on the ownership and use of real property by members of the proscribed minority groups. Since the same reasoning would apply to action by any other branch of a state government or the federal government, it is difficult to conceive of any basis for a plan of residential segregation other than voluntary compliance by the individual owners in an area containing two or more parcels of real estate owned by different persons.

Proponents of segregation, and unfortunately there are many, have not been slow, however, in seeking to devise means of continuing to use state power to maintain ghettos.[39] Most of the suggestions appear to be based on the Court's observation that "the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment." These proposals ignore the reason given for that observation, although the Court was specific in its statement that "[s]o long as the purposes of these agreements are effectuated by *voluntary adherence to their terms* it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated."[40] It has been impossible to secure unanimous voluntary adherence to plans of residential segregation in the past, as its proponents know, but none of the plans proposed appears to have overcome the Court's broad barrier to segregation by judicial decree or other governmental action.

For example, one group proposes that each signer of a restrictive covenant be required to make a cash deposit or give a bond conditioned on his compliance with the terms of the limitation and providing for forfeiture to the other signers or an association of them in the event of non-compliance. In this connection it is significant that the limitation involved in the *Hurd* case expressly provided "that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or any colored person under a penalty of $2,000 which shall be a lien against said property." At the bar, counsel on both sides advised the Court that, though this was the provision commonly used in the District of Columbia because it was the one involved in *Corrigan v. Buckley*, there had never been an effort to collect the penalty, and there had been no such effort in the instant case.

[39] See U.S. News and World Report, at 22–23, 50 (May 14, 1948), for a description of a number of these proposals.

[40] Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (italics added).

The superiority of specific performance over an action for damages as a means of excluding the proscribed group seems obvious. It would appear impossible, however, in the light of the reasoning of the Court in these cases to distinguish a judgment to enforce such a penalty from a decree in equity ordering specific performance. Each would be equally "state action" and each would be equally within the proscription of the Fourteenth Amendment or the Civil Rights Act, as the case might be.

If a cash forfeit were actually deposited, however, a somewhat different question might arise. If the return of the deposit was sought prior to any transfers of property to one of the proscribed group, quasi-contract rules developed to prevent "unjust enrichment" would appear to require return of the deposit.[41] The stakeholder's only defense to an action for its return would be the agreement. If this defense was upheld by a court it could only be by virtue of a rule of substantive law that such agreements were enforceable. That rule would, of course, run afoul of the constitutional limitation applied in the instant cases.

The fact that the constitutional limitation would have to be invoked by a white property owner in such a case would appear to be immaterial. Indeed, in the companion case to the *Hurd* case, *Urciolo v. Hodge*, one of the petitioners was a white real estate dealer who still owned three lots subject to the restriction. He had sold three others to the Negro petitioners in the same case and had been enjoined from selling his remaining lots to Negroes. In protecting Urciolo as well as the buyers the Court only followed the precedent established by *Buchanan v. Warley* where the ordinance was held invalid on an attack by the white seller, not by the Negro buyer.

Even if the depositor had transferred his property to one of the proscribed group, it would appear that he should be entitled to secure the aid of the courts to force the return of the deposit. As before, the *Urciolo* case appears to be a square authority, since the white real estate dealer there had already transferred three lots but was nevertheless held entitled to relief.

It might be argued in either case that restitution ought to be denied because the parties to such an action would be *in pari delicto*.[42] But, ac-

[41] See generally, 3 Page, Contracts § 1503 (1920).

[42] See 2 ibid., at § 1020. A distinction might be drawn between the two hypothetical cases on the ground that the owner who seeks to withdraw from the agreement while it is wholly executory places himself in locus poenitentiae and is thus entitled to restitution. This would be in accord with the weight of authority. In neither case, however, is there any real distinction between the owners seeking to withdraw insofar as their connection with carrying out the plan is concerned.

cording to the Court in the instant cases, it is the enforcement of the agreement, and not its making or compliance with it, which is "illegal," and therefore this limitation on the right to restitution should have no application here. The *in pari delicto* rule itself has been severely criticized,[43] and many states have modified it by statute with respect to particular classes of cases.[44] Certainly the policy on which the rule was based—that of refusing the aid of the courts to individual wrongdoers—would not justify its application here where strong policy with respect to protection of individual rights forbids judicial enforcement of such agreements.[45]

Even more important, however, than the legal objections to the deposit plan is the fact that it is doubtful whether many owners would be able or willing to post such deposits. To achieve the desired effect the deposit would have to be a substantial one, and neither present owners nor prospective purchasers are likely to be sold on the advantages of such a plan if it is to their economic disadvantage, no matter how anxious they may be as individuals to maintain the "racial purity" of the particular neighborhood.

For the present owner it would mean an increase in the cash outlay necessary to maintain previously purchased housing, and to the extent that he did not receive the current interest rate on the deposit it would increase his costs. In fact such a plan would probably be beyond the financial resources of many property owners in neighborhoods contiguous to considerable concentrations of Negroes, where restrictive covenants seem to have been most widely used. Prospective purchasers certainly will not pay the market price for property plus a substantial deposit, and there is no reason for most sellers to reduce their prices below the market by the amount of the deposit, particularly since with the sale it is more than likely that they will no longer be interested in the character of the neighborhood. Only the seller of a number of parcels, such as the developer of a new area, is likely

[43] See 2 ibid., at § 1061; Wigmore, A Summary of Quasi-Contracts, 25 Am. L. Rev. 695, 712 n. (k) (1891).

[44] See, for example, Iowa Code (1946) § 129.6 (restitution of payments on illegal liquor contracts); Ga. Code (1933) § 20–505, and Miss. Code Ann. (1942) § 24 (perhaps the most common modification—recovery of gambling losses); Miss. Code Ann. (1942) § 23 (recovery by losing gambler's family); Ariz. Code Ann. (1939) § 36–104 and D.C. Code (1940) § 28–2704 (restitution of usurious interest payments); Me. Rev. Stat. (1944) c. 100, § 154 (return of consideration prerequisite to assertion of defense that contract was made on Sunday).

[45] It has been held that where the purpose of the statute or rule of substantive law which makes the contract in question "illegal" is intended for the protection of a particular group, the doctrine of pari delicto will not be applied to bar restitution to one of that group. B. & O. S. W. R. Co. v. Hagan, 183 Ind. 522, 109 N.E. 194 (1915). In restrictive covenant cases the ban on judicial enforcement of these limitations operates for the benefit of both the Negro buyer and the white seller so that the cases would appear to come within this narrow exception.

to be willing to undertake establishment of such a scheme. Even such a seller will find the plan to his advantage only if the price which he can charge for each unit will exceed the price which he could charge without the limitation by the amount of the deposit plus the cost of administering the plan. Put another way, residential segregation under such a scheme would be possible only to the extent that participants were willing to pay for it.

Even if deposits were made, it would be inevitable that some owners would find it profitable to forfeit the deposit in order to take advantage of an offer for their property. In effect, then, such a plan would only result in superimposing on the market price of the property involved a premium equal to the amount of the deposit. In the absence of monopoly benefits, then, such a plan seems hardly feasible.

Another proposal is the "club membership" device. This plan envisages the formation of a "club," or use of an existing one, which would hold title to all of the property in an area. Membership in the club would, of course, be prohibited to Negroes, Jews, or other groups and would be a condition precedent to the occupancy of property in the area. The residents of the property would simply own shares of stock or a membership in the club and would thereby be entitled to occupy certain property.

One difficulty with this plan is that the occupant would never have title to any particular real estate. Obviously the "memberships" would have to be transferable in order to provide a means of accomplishing the inevitable necessary changes in occupancy of particular dwelling units. No matter what conditions were imposed on the transfer, such as approval by the other members or by a committee or board, the ability of the householder to utilize the property for security purposes or to dispose of it would be seriously limited even if it be assumed that his control of the property would be otherwise absolute. To that extent the plan would be undesirable to either present or future owners.

If at any future time a "member" sought to transfer his interest to one of the proscribed group and approval was withheld, some interesting legal questions would arise. At least two involving recourse to the courts suggest themselves at first glance. If an "undesirable" acquired possession of the property pursuant to the transfer, and the "club" brought suit to evict him, it would appear impossible to justify judicial intervention in light of the instant cases. There, as here, the state's power would be invoked to distinguish between persons on the basis of their race or religion, and application of the doctrine of the *Restrictive Covenant* cases would deny the remedy sought. On the other hand, a "member" who sought judicial aid to

free "his" property from the restraints of such an arrangement would appear to be entitled to it. No matter what device is adopted for controlling the legal title the equitable interest will rest in the individual members, and only enforcement of the restrictive agreement as manifested by the club charter or by-laws would bar the relief sought. If such a plan were upheld, the court's action and the substantive rule which it applied would fall under the constitutional limitation on "state action" just as they did in the instant cases.

The problem of proof of failure to provide "equal protection" might be somewhat more difficult in these cases than it was in the Michigan and Missouri cases. If membership were limited in terms of race or religion, as the restrictive covenants limit ownership and occupancy, there would be no difficulty in proving discrimination. If membership were not so limited, refusal by the "club" to approve a transfer to one of the proscribed group might make proof of discrimination more difficult, but it would also make it more difficult to justify withholding approval of the transfer and thus might subject the "club" to an action for damages for breach of its contract with its members. In any event, proof of the actual practice and application of the doctrine of *Yick Wo v. Hopkins*[46] would raise the question of the legality of the exclusion of a particular racial group if aid of the courts was sought to prevent transfer of a "membership" to one of the proscribed group.

Somewhat similar is the proposal to establish a business corporation to hold title to property in a particular area, the shares being distributed among the owners of the property on some pro rata basis. Under this plan a certain number of shares would entitle the shareholder to occupancy of particular property with the accompanying duty of maintenance and management thereof. One major objection to this plan is that there would appear to be no practicable way to prevent any shareholder from transferring his stock to any person. This would give rise to a duty on the part of the corporation both to record the transfer of the securities and to allow the new shareholder to occupy either the premises formerly occupied by his transferor or some comparable property owned by the corporation.[47] Here, too, the practical difficulties of getting property owners to give up the control of their property which the ownership of legal title entails would probably be a practical deterrent to any widespread adoption of such plans.

[46] 118 U.S. 356 (1886). There the court held a statute invalid which, though fair on its face, was administered unequally to the detriment of certain Chinese.

[47] 12 Fletcher, Corporations § 5518 (1932).

Combined with any of the devices just outlined, or used separately, an option on all of the property in an area to be held by a single individual or association might be thought to facilitate enforcement of limitations on ownership or occupancy of the property. For this plan to be effective, the holder of the option would have to control substantial assets lest several pieces of property be offered for sale at once and the purpose of the limitation defeated because of lack of funds to exercise the option. Moreover, some means of providing for fluctuations in the market prices of the property during the life of the option would be essential.

Actually there would be no real difference between such an option and any other restrictive agreement, and the judicial enforcement of such an option would be similarly banned by the Constitution. The mere fact that the option to buy might be required as a part of an original sale, as in the marketing of a new development, would not alter the characteristics or the legal implications of such an agreement.[48]

The practical difficulties, particularly insofar as price fixing is concerned, would appear to be insuperable, and it is at the point where the price offered by the Negro purchaser is greater than that offered by any white purchaser that voluntary compliance with residential segregation plans ceases. Unless the holder of the option is prepared to outbid all members of the proscribed group, this plan seems hardly likely to offer any greater possibility than any of the others. One version of this plan would provide for payment of a price in excess of the highest price offered by a member of the proscribed group. Apart from the administrative difficulties of operating such a scheme, its economic implications would appear to be similar to those of the "deposit" plan and equally unlikely of any considerable acceptance.

Another proposal is for an agreement that approval of the immediate neighbors be secured before such property can be transferred to any person. Judicial enforcement of such an agreement would appear to be inconsistent with the instant cases if it could be shown that the approval was withheld solely because of the race or religion of the prospective purchaser. Here, too, the problem of proof might be a difficult one, but if it could be shown that the parties concerned understood that the standard for neighborhood approval was the race or religion of the prospective purchaser or that this standard was actually used as the basis for the granting or withholding of neighbor approval, it would appear that no judicial enforcement of the limitation could be secured.[49]

[48] The restriction involved in Hurd v. Hodge, 334 U.S. 24 (1948), had so originated.

[49] Actually any case in which this issue arose would bear exactly the same relationship to the Restrictive Covenant cases that Harmon v. Tyler, 273 U.S .668 (1927), bore to Buchanan

Some proponents of restrictive covenants argued that their purpose was to maintain "property values." In one sense such an argument is demonstrably unsound, since to limit the group of buyers can never be to the seller's advantage. What was really meant was that there was an element of value in protecting a particular neighborhood from the overcrowding which characterizes the Negro ghettos. To achieve that end, even opponents of racial residential restrictions have proposed a different type of occupancy limitation aimed at maintaining neighborhood standards and therefore neighborhood property values.[50] These "occupancy standards agreements" would impose limitations on the number of persons, regardless of their race, who might occupy particular housing units or would require a minimum of space per occupant. For example, one such agreement, which has already been signed by some owners in the Oakland-Kenwood area in Chicago, requires that not more than two adult persons per room be permitted to occupy each housing unit and that a minimum of fifteen square feet per person be provided.[51]

Obviously these limitations would substitute class restrictions for racial restrictions, since only persons with sufficient income to buy or rent the requisite space per person in the family could live in an area covered by such an agreement. Widespread adoption of the plan might ultimately force the largest families in low income groups, irrespective of race, into the least desirable housing, since essentially the plan depends on maintenance of a scarcity of housing facilities to maintain neighborhood "values."

Maintenance of a residential area by a group of persons whose economic status is roughly the same will probably make this proposal attractive to subdividers and real estate developers who are already committed to the notion that uniformity among the occupants of an area tends to promote and maintain property values. Unfortunately for present evaluation of the plan in operation, the one substantial area in which it is now being tried lies on the edge of Chicago's "Black Belt"; it already has a number of

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v. Warley, 245 U.S. 60 (1917). In the Harmon case the Court held that since a city ordinance prescribing the areas in which persons of different races might live was a violation of the Fourteenth Amendment, the same Amendment also invalidated an ordinance providing that if the residents of an area so elected, persons of another race must keep out of that area.

[50] See Weaver, op. cit. supra note 12, at 342–58, where a strong case is made for adoption of such limitations.

[51] This agreement is being pushed by the Oakland-Kenwood Property Owners Association, long a leader among Chicago groups intent on excluding Negroes from particular areas. Their interest in the "occupancy standards agreements" antedated the decisions in the Restrictive Covenant cases but came after a number of Negro and Japanese families had ignored the existing restrictive covenants and moved into the area.

Negro and Japanese occupants; and its housing units in the main are old, obsolete in style and appointments, relatively large in size, and therefore readily cut up into small apartments. As a result, present owners who wish to secure the highest possible price for their property are reluctant to impose any such limitation on the property, since the price at which such property would sell is reduced if buyers are limited in the number of persons to whom they could rent space. Similarly, new owners who acquired the property with a view to maximizing income from it by imposing higher rents on as many Negro tenants as could be squeezed in, thus taking advantage of the greater relative shortage of housing among Negroes, are unwilling to enter into such an agreement, since the price they paid or contracted to pay for the property was based on the anticipated return from providing housing facilities to the largest possible number of persons.

The most favorable area for the use of "occupancy standards agreements" would appear to be one in which new single-family dwellings are currently being sold. In such an area purchasers are interested in occupancy, not rental. Moreover, they are likely to be of the same general income group at the time of purchase. Here the limitations would operate to minimize the effect on the neighborhood of a change in income of some of the residents, since a reduction in income could not be met by renting a part of the house or otherwise exploiting the property to the detriment of the area.

In one sense, such an agreement would operate as private zoning, but application of constitutional barriers to enforcement of such limitations is difficult to predict even though their impact on the whole community might be undesirable.[39] Conceivably, they might have some effect on residential segregation if they were used in some areas occupied either wholly or partly by Negroes, since they might serve to show that Negro occupancy and overcrowding were not inevitable companions. Unfortunately, these agreements would bar all families which were large in relation to their income, and to the extent that urban Negro families have lower incomes than whites more of the former would be barred by their poverty from housing in areas covered by such agreements. Taken altogether these

[39] It could be argued that judicial enforcement of such restrictions amounts to denial of "equal protection" to large low-income families. To the extent that the restrictions of such agreements are more severe than the provisions of sanitary and building codes adopted by the legislature, there would appear to be no reasonable relationship between the classification thus given effect and the unquestioned power of the state to regulate use of housing facilities. Whether any constitutional protection is provided against discrimination by a state on account of poverty has seldom been before the Court; cf. Edwards v. California, 314 U.S. 160 (1941), holding unconstitutional that state's effort to prevent the entry of destitute "Okies" who had been driven out of the "Dust Bowl" by lack of economic opportunities there. In theory, all such "class" restrictions fall under the ban of the equal protection clause.

agreements may have a limited community educational use but are hardly likely to have much appeal for either side on the issue of residential segregation, since they do not aid in its continuance but do limit the number of housing units immediately available for Negro occupancy.

When the various proposals are considered, the conclusion seems warranted that the *Restrictive Covenant* decisions render ineffective any device for maintaining residential segregation whose usefulness depends on utilization of governmental authority to achieve its end. Obviously, however, there are other and equally effective means of maintaining ghettos in the United States. First and foremost among these is the perhaps immeasurable effect of the pressure of social attitudes which affects both majority and minority groups. For example, the recognizable and often strongly articulated attitude of neighbors in a particular area on the matter of Negroes, Jews, or persons belonging to other minority groups living in a particular neighborhood will almost certainly affect a householder's decision to sell or rent to a member of such a group even without the possibility of judicial action to compel that result.[53] The same attitude on the part of neighbors will operate similarly to deter or prevent a member of a minority group from buying or renting a particular property.[54]

Economic factors operative in the allocation of housing would appear to be equally important in the maintenance of ghettos. To begin with, the owner of property located in an area in which there is, or there is said to be, hostility toward a particular minority group or groups is hardly likely to violate the community taboos by renting property to members of minority groups if he cannot collect higher rents than he could secure from some other tenants who do not belong to the proscribed class. Under conditions of controlled rents, then, there is every likelihood that the social attitudes would be determinative. This result would follow whether the controls were effective or easily evaded, since evasion would be equally

[53] As indicative of the extent of this attitude see Weaver, op. cit. supra note 12, at 214–15. The author reports a Fortune poll showing that, of the sample taken on a national basis, substantially less than 15 per cent of the people in the United States were opposed to residential segregation, and a Minnesota poll showing 30 per cent of the people there so opposed with 10 per cent undecided.

[54] One way in which the neighborhod attitude may be manifested is by acts of violence against Negro residents. Some evidence of the extent to which these acts occur may be found in the fact that in Chicago since 1944 there have been more than one hundred separate occasions on which such violence was reported to the police. In many cases the incident involved only stoning of the property occupied by Negroes, but there were at least two occasions on which dynamite bombs were exploded and several cases involving arson. On one occasion there were mobs of several thousand people and violence lasting over a period of several successive days. Yet only a few arrests and fewer convictions have ever resulted. The effect of such a history on the attitude of Negroes has never been formally studied, but it would appear to be a considerable deterrent to the exercise of a "free choice" in the housing market.

possible with respect to either group of tenants. Under these circumstances the ability and willingness of the minority group to pay higher rents, and the pressures upon it to secure better housing, are hardly likely to have any effect.

Since a sale by a resident owner would permit him to move to another neighborhood, local pressures have only a slight effect in limiting sales of property to Negroes or to other persons who buy for the purposes of renting such property to Negroes. To that extent the resident and non-resident owners would appear to be subject only to attitudes generally prevailing in large sections of the community with respect to the maintenance of residential segregation. In either case the Negro purchaser, or the purchaser who contemplates renting to Negroes with the attendant opportunity to charge higher rents on termination of rent control, can overcome the effect of social pressures by bidding more for the property than whites are willing to pay. The extent to which this course is likely to be followed is difficult to predict. It will depend in large measure, of course, on the economic resources of individual Negroes and the extent, if any, to which they are willing to devote those resources to satisfaction of their housing needs. Equally important and equally difficult to estimate is the extent to which individual and group prejudices can be overcome by appeals to cupidity. The suits brought to enforce restrictive covenants demonstrate at least that willing Negro buyers have been successful in finding some willing white sellers in areas not formerly occupied by Negroes.

Only fragmentary data are available with respect to current individual incomes and savings of Negroes generally, but it is at least clear that the relative and actual economic position of many Negroes has improved substantially in the last decade.[55] For example, according to the census estimates of income for 1946, there were about 85,000 urban Negro families in the northeastern and north central states with annual incomes of $5,000 or more. They represented more than 6 per cent of the number of Negro families in the areas, and more than 13 per cent of the Negro families in the areas had incomes between $3,000 and $5,000.[56] With these reports of conditions in 1946 should be compared the situation in 1935–36 when a survey of incomes in Chicago showed that only 5.3 per cent of Negro families had incomes over $2,000 and only 23 per cent had incomes between $1,000 and $2,000. At that time 46 per cent of the Negro families in Chicago

[55] For an authoritative discussion of income distribution among Negroes see Weaver, op. cit. supra note 12, at 125–38.

[56] Current Population Reports, Consumer Income, P-60, No. 1, Bureau of the Census, at 10 (1948).

were on relief.[57] Even in 1940 in metropolitan Chicago 35 per cent of the non-whites were unemployed as compared with 13 per cent of the whites. But in 1947, only 7 per cent of the non-whites and 2 per cent of the whites were unemployed.[58] Equally significant is the fact that a recent survey of the two worst slum areas in Chicago which are occupied by Negroes showed that more than 30 per cent of the six hundred families living in the areas had incomes in excess of $2,500 per year.[59]

Major changes in general economic conditions would alter this picture, and it might be expected that Negroes would suffer from a depression more than would whites. Nevertheless, it appears reasonable to estimate that there are many hundreds of urban Negro families now living in slums who earn enough to enable them to bid for adequate housing in their communities. If these prospective purchasers were able to pay cash for a house, only the attitudes of property owners would appear to stand in their way.

Where, however, as in a substantial majority of residential property transfers, the transactions must be financed in large part either independently or through the seller, other social and economic factors which come into play often operate to prevent the sale of property for Negro occupancy. Most if not all banks, insurance companies, and other lending institutions are unwilling to loan money for the purchase or construction of housing for Negro or mixed occupancy in areas not now occupied by Negroes.[60] Even the Federal Housing Administration's practices in approving

[57] Family Income & Expenditure in Chicago, 1935–36, Vol. I, Bulletin No. 642, U.S. Dept. of Labor, at 6.

[58] Current Population Reports, P-51, No. 29, Bureau of the Census (1947).

[59] Chicago Housing Authority, Report on Relocation Survey for Illinois Institute of Technology and Michael Reese Hospital Clearance Areas.

[60] Weaver, op. cit. supra note 12, at 222–27 describes unsuccessful efforts to finance multiple unit developments during World War II. The actual experiences of Negro would-be purchasers and their brokers and lawyers in attempting to negotiate loans are even more striking when the properties involved are single-family dwellings or two-, three-, or four-family buildings. This attitude on the part of lending institutions is reported in all parts of the country.

One of the most striking illustrations of this position is that the Metropolitan Life Insurance Company, which controls the largest aggregate of capital in the United States, excludes Negroes from its "Stuyvesant Town" in New York City, an 8,000-unit development. A Metropolitan development located in Harlem, Riverton Houses, houses about 1,200 Negro families. Since "Stuyvesant Town" was built on land acquired by municipal condemnation and is to be operated without increase in assessed value for twenty-five years, a suit has been undertaken on behalf of several Negro would-be tenants based on the theory that these public benefits impose corresponding obligations. The complaint was dismissed below, and the matter is now pending on appeal. Dorsey v. Stuyvesant Town Corp., New York Supreme Court, Appellate Division, No. 14108–1947. See 15 Univ. Chi. L. Rev. 745 (1948), noting the trial court's decision.

loans which it will underwrite manifest the same attitude.[41] Whatever justifications are offered are based on the widely held notion that Negro occupancy reduces the value of property, including both the units so occupied and those surrounding them. Therefore, it is argued, security for loans outstanding on property in the same area will be impaired if such a loan, itself a bad risk, is made.

Evidence to support this conclusion is never offered. In fact, no evidence exists. It is obvious that the overcrowding of the ghettos deteriorates the property, but deterioration is equally rapid whether Negroes or whites live under such conditions. Moreover, applications to both Negroes and whites of the same rules as to personal credit standing as a prerequisite to making loans would appear to solve much of the concern over comparative risks.[42] Under these circumstances the attitude of the lending institutions can only be explained as a manifestation of, or a concession to, general community attitudes toward residential segregation.

If there were a truly competitive capital market this attitude would not be determinative. The Negro would-be purchaser could overcome the impact of social pressures here just as he could overcome their effect on the landowner by the simple device of offering a higher price for the capital in the form of a higher interest rate or other terms more favorable to the lender than those generally prevailing. The social pressures which have been outlined could hardly be expected to operate on a lender as they would on a seller. This would be particularly true in large urban communities, unless the lender was himself a resident of the neighborhood involved or had made other loans on property in the same area. Moreover,

[41] Prior to 1947 the FHA Underwriting Manual was specific in its requirement that to receive a "high rating" the property and the areas must be covered by a restrictive covenant. In 1947 the manual was revised to eliminate references to race in discussion of "user groups." Investigation, however, reveals no change in actual FHA operations. Refusal of the agency to underwrite loans because of the race of some, or all, of the occupants of the property involved is a flagrant violation of the duty imposed on all government officers to make no distinctions on account of race. Indeed, the instant cases would appear to require FHA to withhold its approval of loans where racial restrictions are imposed. The Commissioner denies his obligation in this regard. Letter dated Nov. 1, 1948 addressed to Thurgood Marshall, Special Counsel, NAACP, signed by Franklin D. Richards, Commissioner, FHA.

For full discussion of the shameful part FHA has played in residential segregation and of its changes in policy see Weaver, op. cit. supra note 12, at 71–73, 148–54. See also Dean, None Other than Caucasian: A Study of Race Covenants, J. Land & Pub. Util. Econ. 30 (Nov. 1947).

[42] Questionnaires sent by the National Association of Real Estate Boards to local real estate boards led to the conclusions that "the provision of good housing for Negroes can be carried out as a sound business operation and that the Negro family that wants good housing is usually a good economic risk." Press release, National Association of Real Estate Boards, No. 78 (Nov. 15, 1944). For a discussion of facts and fancies on the effect of Negro occupancy on real estate values see Weaver, op. cit. supra note 12, at 279–303.

it is hardly likely that all the bankers and managers of lending institutions would live in the same neighborhood and would react to every neighborhood in the same way. In smaller communities with only one or two lending institutions the social pressures might well be determinative if funds were not available from outside sources.

It is folly, however, to assume that Negroes or other minority groups do have access to a truly competitive capital market. The decision in the *Restrictive Covenant* cases removed the legal barrier to access to capital for housing for Negroes, but it did not affect the power of the managers of lending institutions to refuse loans on property not now occupied by whites. The exercise of such power, whether on a rational basis or not, still operates in large measure to continue residential segregation.

Other factors contribute materially to the maintenance of the ghettos. Among them are the practices and the codes of real estate boards and operators. In most urban communities real estate brokers to a great extent control the movement of residential property, largely because both buyers and sellers rely on the brokers to bring them together. Throughout the country, real estate boards are agreed that they will not act to sell property to Negroes which is located in white neighborhoods.[63] That practice remains untouched by the recent decisions.

It must be concluded, then, that the Supreme Court has destroyed only one of the props for the walls around the American ghettos. Nevertheless, so important were the legal sanctions and psychological impact of restrictive covenants that the recent decisions serve to remove a major restraint on the market in urban housing. Thus, the economic resources of Negroes and other minority groups can be brought to bear on residential segregation. In that way the whole community is necessarily benefitted to the extent that such resources are no longer limited to provision of shelter in a segregated area, but are added to the total available to meet housing needs. Only in this way will major slum clearance programs ever be possible in most cities, since the worst slums are occupied by Negroes. To that extent the decisions are a major contribution to the solution of the problem of residential segregation and to the problem of national housing as well.

[63] The Code of Ethics of the National Association of Real Estate Boards provides that "[a] realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood." A member board which fails to enforce this Code of Ethics may be expelled from the Association. It should be observed, however, that some realtors, both white and Negro, violate the Code. Their practice is to acquire real estate on the periphery of Negro neighborhoods for the purpose of encouraging Negro occupancy. White people subsequently leave the area, and it becomes possible to cut apartments into smaller units and charge exorbitant rents.

Though the decisions in the *Restrictive Covenant* cases are not a judicial solution for all of the problems of residential segregation, they do eliminate the use of the power of the state to maintain ghettos. The Court reached that result by applying the Fourteenth Amendment to activities seldom previously regarded as within its scope and by construing the "equal protection" clause as prohibiting judicial decisions based on race or color classifications, even though the courts are only carrying out distinctions initiated by the acts of private persons. This construction of the Fourteenth Amendment offers tremendous possibilities for future judicial aid in solution of contemporary problems similar in scope and complexity to residential segregation. Perhaps the whole range of issues arising in connection with racial segregation may be encompassed by logical application of the constitutional theory adopted in the instant cases. Moreover, the Court's construction of the Constitution suggests increased federal scrutiny of the rules of decision of state courts. Thus these decisions are of major importance above and beyond their effect on restrictive covenants.

Ever since the *Civil Rights Cases*, it has been generally accepted that the limitations of the Fourteenth Amendment apply only to "such action as may fairly be said to be that of the States." Indeed, the cases which have come before the Court have usually involved the question of what constitutes such "state action."[64] Until now, however, it does not seem to have been recognized that any prohibition on state action under the Fourteenth Amendment must inevitably impose a corresponding limitation on the conduct of individuals. In fact, even in the instant cases the Court observed: "That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

The decision, however, makes it eminently plain that this generalization must be qualified, since, if the "private conduct" in question requires recourse to a state agency to make it effective, the Fourteenth Amendment precludes such state aid. The Amendment therefore vitally affects some private conduct. Thus, in the instant cases it operated to bar the adjacent St. Louis and Detroit property owners from securing judicial enforcement of the limitations on the property involved. Put another way, though the parties to the restrictive agreement had taken all the steps they could to make it binding, application of the Fourteenth Amendment nullified their acts. They were left in the same position they would have occupied had no agreement been undertaken, since then each property owner

[64] See Grovey v. Townsend, 295 U.S. 45 (1935). But see Smith v. Allwright, 321 U.S. 649 (1944), overruling the Grovey case. Generally, see Negro Disenfranchisement—A Challenge to the Constitution, 47 Col. L. Rev. 76, 86–87 (1947), and authorities there cited.

would have been free to hold his property or to sell to whomever he chose. After these decisions, as the Court pointed out, only "voluntary adherence to their terms" could be relied on to effectuate the purposes of the agreements. Thus it must be concluded that the constitutional limitations operate not to forbid any particular acts by individuals but to limit the acts of individuals which the state may treat as lawful. Necessarily, then, such acts may not be given controlling weight by courts in resolving issues between individuals.

This result followed inevitably from the Court's recognition that substantive judicial decisions are as surely the acts of the state within the meaning of the Fourteenth Amendment as are statutes passed by the legislature and signed by the governor. The range and scope of judicial decisions, however, are vastly greater than those of statutes, and decisions more often deal with the details of relationships between individuals. It is these things which raise interesting questions as to future applications of the Fourteenth Amendment, particularly when the equal protection clause is construed as outlawing race or color discrimination as a basis for unequal legal treatment of property rights.

Logical application of the rule of these decisions would appear to open to federal judicial scrutiny much, if not all, of the area of racial discrimination, including segregation.[65] Although these decisions do not ban segregation expressly, they would appear to provide judicial remedies against much of it. Concededly, it may be questioned whether the Court had any such purpose and whether there was any judicial realization that the decisions might have this effect.[66] Nevertheless, no logical basis appears for denial of federal judicial relief in many situations in which the federal courts were formerly believed powerless.

For example, in many states and the District of Columbia Negroes are uniformly refused accommodations in all public places such as hotels, theaters, and restaurants. If they are admitted, as in public conveyances, they are segregated.[67] In some cases these practices are in violation of state statutes, in others they are compelled by statute, and in still others

[65] Whether "segregation" is "discrimination" is a question which arises only if it is assumed that the equal protection clause prohibits the latter but not the former. So put, the question evades the real issue: whether lawmaking which draws distinctions based solely on race satisfies the constitutional limitations. See Fraenkel, Our Civil Liberties 201 (1944).

[66] Compare the effect of the decision in United States v. Classic, 313 U.S. 299 (1941), on the rule of Grovey v. Townsend, 295 U.S. 45 (1935). See Roberts, J., dissenting in Smith v. Allwright, 321 U.S. 649, 669 (1944).

[67] As to the scope, extent, and character of racial segregation and discrimination in the United States see Myrdal, op. cit. supra note 20, at 605–39.

there are no applicable statutory provisions.[68] With the first group we are not now concerned.[69] It is the second and third which are affected by the Court's decisions.

Where racial segregation or exclusion is compelled by statute there is no problem of "state action." The only question presented is whether the classification adopted violates the limitations of the Fourteenth Amendment. Until now that question was believed to have been answered in the negative,[70] but there has been little or no consideration given to the basis

[68] Eighteen states prohibit racial discrimination in varying degree. Twenty states and the District of Columbia compel racial segregation with the same lack of uniformity in the various statutes. Ten states and the federal government acting with respect to areas of federal jurisdiction outside the District of Columbia have no statutes on the subject. See Konvitz, The Constitution and Civil Rights 132–41, 208–41 (1947), for a classification and citations of all of these statutes.

[69] See Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945), holding valid the New York anti-discrimination statute applied to prohibit racial discrimination in qualifications for membership in a trade union. In Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948), the Supreme Court upheld a state court's enforcement of that state's anti-discrimination act against a carrier operating between Detroit and an island on the Canadian side of the Detroit river. On certiorari petitioner attacked the statute only on the ground that it was an interference with foreign commerce beyond the power of the state.

[70] The question of the constitutionality of a state statute requiring racial segregation was first raised in the United States Supreme Court in Plessy v. Ferguson, 163 U.S. 537 (1896). There a Louisiana statute requiring separation of black and white passengers by interstate carriers was upheld chiefly on the authority of cases in which school segregation statutes had been held valid by state courts. The only one of these precedents discussed by Justice Brown was Roberts v. Boston, 5 Cush. (Mass.) 198 (1849), which had been decided nearly twenty years before the Fourteenth Amendment was adopted. As Justice Harlan pointed out in a biting dissent, the majority in the Plessy case paid lip service to the requirement that legislative distinctions must be "reasonable," but nowhere was there any showing that there is any reasonable relationship between the race of passengers and "the end to which the legislature was competent"—the regulation of public transportation. 163 U.S. 537, 559 (1896); cf. Hirabayashi v. United States, 320 U.S. 81, 100 (1943); Korematsu v. United States, 323 U.S. 214, 216 (1944); and Perez v. Lippold, 198 P. 2d 17 (Cal., 1948).

Defenders of such statutes also rely on Gong Lum v. Rice, 275 U.S. 78 (1927), and Cumming v. Bd. of Education, 175 U.S. 528 (1899), as well as dictum in Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 344 (1938). In the Gong Lum case the major thrust of the petitioner's attack on the Mississippi school-segregation statute was that Chinese were excluded from white schools. Chief Justice Taft relied on the Plessy case and authorities there cited, and he made no pretense of considering whether there was any reasonable relationship between the race of the students and the public interest in state control of public education. In the Cumming case the segregation issue was not raised. 175 U.S. 528, 543–44 (1899). In the Gaines case the Court applied the pernicious "separate but equal" doctrine but held that the segregated-school system denied equal protection to the Negro petitioner because no law school for Negroes was provided. But see Sipuel v. Board of Regents, 332 U.S. 631 (1948), and the same case sub nom. Fisher v. Hurst, 333 U.S. 147 (1948), where this dictum was not repeated.

No presumption of constitutionality of these segregation statutes should be predicated on their number or on the fact that they have seldom been seriously challenged. In Morgan v. Virginia, 328 U.S. 373 (1946), the Court ruled that application of a state "jim-crow" statute to interstate commerce violated the "negative implication" of the commerce clause of the federal Constitution despite the fact that such statutes had been so applied for generations by several states; cf. McCabe v. A.T. & S.F. Ry. Co., 235 U.S. 151 (1914), and Mitchell v.

for the result. The construction given the equal protection clause in the *Restrictive Covenant* cases, however, raises a serious doubt as to the validity of any such opinion.

In these cases the Court bluntly declared:

> We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color. . . .
>
> The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind.[71]

In so construing this constitutional limitation the Court only followed its own declarations in *Yick Wo v. Hopkins*,[72] *Yu Cong Eng v. Trinidad*,[73] *Hill v. Texas*,[74] *Hirabayashi v. United States*,[75] and *Oyama v. California*.[76] In the *Hirabayashi* case the Court had said:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.[77]

Statutes which operate differently on persons according to their race, then, must violate the equal protection clause unless some "compelling justification which would be needed to sustain discrimination of that nature"[78] can be shown. It is customary to defend segregation statutes on the grounds that they reflect the desires of the community and are necessary to prevent disorder and conflict between the races. Certainly local attitudes are not sufficient to justify disregard of "basic doctrines of equality," and "preservation of the public peace" has already been held insufficient as a justification for racial distinctions.[79] Significantly, that holding was reaffirmed in the instant cases.

United States, 313 U.S. 80 (1941), where the question of the validity of such statutes was evaded.

[71] Shelley v. Kraemer, 334 U.S. 1, 20, 23 (1948).
[72] 118 U.S. 356 (1886).
[73] 271 U.S. 500 (1926).
[74] 316 U.S. 400 (1942).
[75] 320 U.S. 81 (1943); see Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948).
[76] 332 U.S. 633 (1948).
[77] 320 U.S. 81, 100 (1943).
[78] Oyama v. California, 332 U.S. 633, 640 (1948).
[79] Buchanan v. Warley, 245 U.S. 60 (1917).

In the *Restrictive Covenant* cases the Court granted constitutional protection to "property rights." But any argument that only "property rights" are within the scope of equal protection rests on confusion between the coverage of that clause and the due process clause.[80] Certainly the rights sustained under "equal protection" in the past have not always been property rights in the legal sense.[81] And insofar as they might be called property rights in some other sense, such a definition is also satisfied when a Negro seeks admittance to a public place, since he is claiming a right to use that property on the same terms and conditions as it is used by other members of the public.[82]

The California Supreme Court has already applied the flat prohibition of racial distinctions not based on some "compelling justification" in invalidating that state's anti-miscegenation statute in *Perez v. Lippold*.[83] Indeed, the majority and concurring opinions in that case may serve as useful models for other courts faced with similar questions. Certainly that case seems a complete answer to any contention that constitutional protection is limited to cases involving property rights in any narrow sense, since the right to marry hardly falls in that category.

It thus appears that both the racial exclusion and segregation statutes are invalid, since no rational basis for their classification can be shown. Furthermore, their constitutionality may readily be attacked either by urging invalidity as a defense in enforcement proceedings brought under such statutes or by seeking to enjoin enforcement in either state or federal courts.[84]

[80] The petitioners' reliance on the assertion of property rights in the Restrictive Covenant cases is explained by the fact that they attempted to invoke the due process clause as well as the equal protection clause. See note 37 supra.

[81] In Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), and Sipuel v. Board of Regents, 332 U.S. 631 (1948), the "right" protected was that of an individual to share equally in the opportunities provided for public rights in the property used to provide public education. In earlier cases the equal protection clause was held to prohibit exclusion of Negroes from jury service solely on account of their race. Strauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1880); Ex parte Virginia, 100 U.S. 339 (1880). It seems impossible to reconcile the reasoning of these cases with that of Plessy v. Ferguson, 163 U.S. 537 (1896); see Harlan, J., dissenting at 556. See also Snowden v. Hughes, 321 U.S. 1 (1944), where the right asserted was that of uniform administration of state laws governing primary elections, but where relief was denied to a candidate for office, apparently because no "purposeful" discrimination was shown.

[82] The carrier "jim-crow" statutes would appear singularly vulnerable to this argument because of the unique limitations imposed by both state and federal regulatory statutes on private control of property "devoted to the public use." It may be said that the rights of any individual with respect to such property are greater than with respect to any other property which he does not "own."

[83] 198 P. 2d 17 (Cal., 1948).

[84] American sociologists, following the Sumner tradition of regarding legislation as inconsequential, have been prone to minimize the effect of such legislation. But see Myrdal,

Under the rationale of the *Restrictive Covenant* cases judicial remedies appear available for the victims of racial segregation even in the absence of state statutes. For example, if a Negro presents himself for admission to a privately owned place of public accommodation, such as a hotel, and is denied admission solely on account of his color, it has generally been held by state courts that, in the absence of a statute to the contrary, he is without remedy.[85] But the *Restrictive Covenant* cases require such a decision to meet the test of the Fourteenth Amendment, and the Supreme Court's analysis of that Amendment should compel reversal. The decision of the state court would be "state action" as now defined. Moreover, it is this "state action" which denies the plaintiff damages, and the basis for the court's denial of damages is the race and color of the plaintiff. It thus follows that he has been denied equal protection of the laws in violation of the constitutional prohibition.

It may be argued that the state has done no more in such a case than to leave individuals free to discriminate as they choose. Actually, this is not so. It is the power of the state which ultimately determines the extent of the control which the hotel owner may exert over the hotel property and who may use it. Within the geographical confines of the state, the relationships between individuals, between individuals and property, and between individuals and the state are all determined by state law. In fact, the rules governing such relationships comprise the body of state law. These determinations may, of course, be manifested by statute, constitution, or administrative order or other executive action, but they may also be expressed by judicial judgment or decree. The *Restrictive Covenant* cases must be taken as authority for the proposition that the state's determination, no matter how manifested, must fulfil the requirements of the Fourteenth Amendment, and no determination of a relationship which may vary with the race of the persons involved will satisfy those requirements.

It thus becomes apparent that under the theory of the *Restrictive Covenant* decisions the limitations of the Fourteenth Amendment apply to in-

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op. cit. supra note 20, at 579–80, where the opinion is expressed that these statutes were "effective means of tightening and freezing—in many cases of instigating—segregation and discrimination. . . ."

[85] See, for example, de la Ysla v. Publix Theatres Corp., 82 Utah 598, 26 P. 2d 818 (1933), and cases there cited. There a theater manager insisted that Filipinos must sit in the balcony. Upon the refusal of Filipino patrons to be so segregated, recovery was limited to the price of tickets not used. Even in those states where there are "civil rights" statutes, recovery of damages for exclusion or segregation of a member of a particular racial group is denied if the place involved is deemed not within the coverage of the statute. See Mangum, The Legal Status of the Negro 33–68 (1940), where a number of such cases are cited.

dividuals in that the states may not give their approval to individual discriminatory conduct unless some "compelling justification" is shown. This result follows even though such individuals claim a "property right" to justify their power to discriminate against particular racial or religious groups. Indeed, in the instant cases the respondents claimed a "right" in the property occupied by the petitioners, but the Court prohibited judicial enforcement of that "right" even though its creation had been the attempt of individual citizens.

The issue of judicial enforcement of private segregation and exclusion might arise before the courts in a variety of ways. One obvious case is an action for damages by a Negro whose exclusion was not supported by a segregation statute. Still another possibility is an action in tort by a Negro who had been refused admission and ousted from the premises by the use of reasonable force. Or the proprietor or his servant might sue in tort if the person refused accommodations had resisted the effort to eject him with no more than reasonable force. No material distinction should arise from the manner in which the matter comes to the attention of the court. If the decision is against the Negro, though under similar circumstances there would have been a decision in favor of a white person, the court's action violates the federal Constitution.

Extension of the federal judicial power in this field suggests greater supervision of the state courts by the federal judiciary. The limitations of the Fourteenth Amendment have long been extended beyond the protection of Negroes, and with the express recognition of the obligation of state courts to make their rules of decision conform to those limitations, the area for federal judicial activity seems greatly increased. Actually, of course, it is hardly likely that the Supreme Court will be asked to review the constitutionality of every state court decision any more than it is asked to determine the validity of every state statute. In any event, the court exercises an uncontrolled discretion with respect to granting the writ of certiorari. That alone seems enough to prevent any undue burden resulting from an increase in federal judicial scrutiny of state court action. The construction of the Fourteenth Amendment here expressed would not increase the scope of the power of the federal judiciary to scrutinize the decisions of state courts. That power arises from the obligation of the state courts to enforce the Constitution and laws of the United States and from the jurisdiction of the federal courts, particularly the appellate jurisdiction of the Supreme Court, to consider cases arising thereunder.

It has been suggested that the logical implications of the decisions in the *Restrictive Covenant* cases will lead to a search for limitations on the

doctrine. Perhaps that is true. Actually, however, the Court in those cases adopted a construction of the Fourteenth Amendment which is consistent with both the majority and minority opinions in the *Civil Rights Cases*.[46] It must be remembered that there the Court was immediately concerned with the power of Congress to establish certain standards of conduct for individuals without regard to any action taken in this connection by any of the several states. The anxiety of a majority of the Supreme Court, as then constituted, to delimit the power of the Congress over the political, economic, and social status of the newly freed Negroes led them to construe the Fourteenth Amendment as applying only to "state action." Thus, they concluded that Congress had no power to adopt a statute which prohibited discrimination against Negroes by individuals who operated carriers, hotels, restaurants, and other places of public accommodation. This conclusion, as Justice Harlan pointed out in his dissent, did violence to the public intention in adopting the Fourteenth Amendment: that Negro citizens were not to be subjected to discrimination in the exercise of their civil rights on account of their color but rather were to stand on the same footing in each state as white citizens of that state, and that Congress was to take appropriate legislative action to assure that end.

The distinction between the majority and dissent was verbally reduced to the question of which should be given controlling weight, the language of the amendment or the intention of its proponents and the general understanding of its effect at the time of its adoption. But the real issue between the majority and dissent arose from conflicting views as to whether the future status of the newly freed Negroes or the relationship between Congress and the several states should be given controlling weight. Unconcerned about the former, the majority gave full effect to its predilection for protecting the power of the several states by limiting the power of the federal government.

It seems plain, however, that even the majority assumed a remedy at state law for the minority group. It said:

> In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive

[46] 109 U.S. 3 (1883).

a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied.[87]

Again, in distinguishing the scope of the Thirteenth Amendment from that of the Fourteenth, Mr. Justice Bradley concluded:

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the states by the Fourteenth Amendment are forbidden to deny to any person? And is the Constitution violated until the denial of the right has some State sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?

After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such a refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth Amendment. It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy under that amendment and in accordance with it.[88]

Some years ago, in discussing and comparing "official" and "private" power, Professor Hale quoted the foregoing passages from the opinions in the *Civil Rights Cases* and observed:

[87] Ibid., at 17–18. [88] Ibid., at 24–25.

Inasmuch as negroes would presumably have a remedy under state laws against arbitrary exclusion, the result of the case might be merely to postpone the time when they could press their cases in the federal courts. The interesting question remains whether they have any right under the Fourteenth Amendment to obtain affirmative protection against the acts of the proprietors of the inns, public conveyances and theatres.[49]

On the theory of the *Restrictive Covenant* cases that question must be answered in the affirmative.

[49] Hale, Force and the State: A Comparison of "Political" and "Economic" Compulsion, 35 Col. L. Rev. 149, 185 (1935).

THE ORGANIZED MUSICIANS: II*

VERN COUNTRYMAN†

MECHANICAL COMPETITION

LIKE many other unions, the AFM has long battled the threat of technological unemployment. Like their brother-unionists, the musicians have found that the man who has been displaced by a machine can take little comfort from the orthodox economist's[121] assurance that the long-run effect of all technological change must be the creation of a better life in which his remote descendants may share.'[122] Consequently, they have resisted this change as best they could.

This problem can best be understood if one significant characteristic of the machine in the field of music be noted at the outset. In whatever form, the machine has never eliminated or even altered the musician's function. The machine does not make music—it merely provides a means of preserving and giving wider dissemination to the music made by the musician. That characteristic is significant in two respects. In the first place, by providing a means of reproducing musical performances and making wider dissemination of those performances possible, the machine has created a greater demand for music and probably inspired a greater number of people to become musicians without creating a correspondingly greater demand for the services of musicians.'[123] Secondly, the machine is

* This is the second and final instalment of The Organized Musicians. Part I appears in 16 Univ. Chi. L. Rev. 56 (1948).

† Assistant Professor of Law, Yale Law School.

[121] See Douglas and Director, The Problem of Unemployment, c. x (1931), for a typical presentation of the argument, completely a priori, that the labor-displacing effects of technological development will ultimately be balanced by such compensating factors as reduction of prices and development of new industries. A more realistic study reaches this conclusion: "Today, a state of unbalance exists, and it seems likely that under present conditions unbalance will continue and perhaps become even more pronounced." Anderson, Lorwin, and Blair, Technology in Our Economy 220 (U.S. TNEC Monograph 22, 1941).

[122] The attitude of the displaced worker was well expressed by Philip Murray a few years ago: "Classical economic pronouncements about the automatic absorption of displaced workers by private industry, whether true in the long run or not, are just so much dribble to the men and women who are deprived of their accustomed way of making a livelihood. . . . As a famous economist once said, in the long run we are all dead." Hearings before TNEC pursuant to Pub. Res. 113, 76th Cong. 3d Sess., at 16,505 (1940).

[123] While no precise measurement of these effects has been made, available information indicates the tendency. Thus, federal census figures disclose that while the total population of the United States was increasing by some 43%, the number of gainfully employed musicians

still dependent on the musician for the original performance—a fact which has at once served to dramatize the musician's plight and to aid him in his struggle against mechanization.

In its original manifestations, the machine constituted no threat to employment opportunities. In 1896 the National Gramaphone Company, by introducing a superior recording process and replacing the cylinder-type record with a flat disc, stimulated its only rivals, Edison and the American Graphaphone Company (later Columbia Graphaphone Company),[124] into activity which converted the phonograph from a scientific novelty heard through earphones in barrooms, bawdy houses, and penny arcades to a horn-equipped instrument which could be enjoyed simultaneously by the entire family. But this development did not mean new competition for the musician. Indeed, the phonograph opened an entirely new labor market for him. For by recording his performance he put it into a form which would be purchased for use in the home. And, except for an occasional engagement to play for private balls, the musician's employment opportunities had previously been limited to public performances.

The promise of this new market was soon fulfilled. In 1906 the Victor Talking Machine Company (1901 successor of National Gramaphone Company) converted the phonograph into a thing of beauty by reversing the horn and enclosing it in the cabinet of the Victrola. With the aid of a best-selling line featuring Enrico Caruso, Victor launched a recording

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and music teachers, vocal and instrumental, decreased from 1910 (139,300) to 1940 (129,256) by 7%. Thirteenth Census of The United States, vol. iv, at 54 (1910); Sixteenth Census of The United States, vol. iii, part i, at 81, 83 (1940). Since the census counts only the occupation in which the individual makes most of his income (1910 Census) or to which he devotes most of his time (1940 Census), it gives no indication of the number of persons for whom music is a secondary vocation. Subject to distortions due to the facts that such persons were not completely unionized in the early years, that union rolls include some who no longer follow the profession at all, and that the AFM membership roll includes Canadian and duplicate memberships, some indication of the increase in the total number of persons seeking professional engagements as instrumental musicians may be secured from union membership figures. These figures reveal that the AFM's total membership in 1940 (135,000) represented a 77% increase, and in 1948 (232,000) a 200% increase, over the total claims of all unions representing instrumental performers in 1909 (76,000).

[124] As is not infrequently the case, the structure of the industry was governed by the ownership of patents. Edison's patent of 1878 covered a system of recording sound by means of indentations on a tinfoil-covered cylinder. American Graphaphone Company operated under Bell & Taintor's 1886 patent on a process for cutting grooves in a wax-like cylinder. National Gramaphone Company was built upon a patent issued to Emil Berliner in 1895 which substituted a flat-groove record for the hill-and-dale variety used by Edison and American; see Victor Talking Machine Co. v. American Graphaphone Co., 140 Fed. 860 (D.C. N.Y., 1905). With the expiration of these basic patents, a number of new companies, the most successful of which was the Brunswick Record Corporation, were able to enter the field.

boom that was to last fifteen years.[125] The musicians, who could now supplement their earnings from public performances with the income from recording engagements, had no reason to combat the phonograph.

True, there was one instance of mechanical competition during this time. Player-pianos and "automatic" phonographs were being used to provide accompanying music in the theaters for another new development—the motion picture.[126] To meet this threat, the AFM's 1912 convention authorized the Locals to demand that their members be employed to operate "any mechanical instrument which replaces all or part of an orchestra."[127] The Locals, invoking a variety of arguments,[128] a boycott of the Rudolph Wurlitzer Company (which manufactures musical supplies and instruments in addition to mechanical pianos and automatic phonographs), and the support of other unions,[129] proceeded to enforce the national policy. With substantial assistance from the stagehands' union, which had extended its jurisdiction to include motion picture projectionists in 1908, the Locals did so well that by 1916 the AFM expanded its demands to require that "the introduction of a music machine shall not interfere with the minimum number of men rule of the Local."[130] Within a few years thereafter the Locals had succeeded in placing union musicians, in numbers varying from a single pianist or organist to a full orchestra, in practically every movie theater in the country.

This result was achieved without any recorded instance of litigation on the merits of the Federation's campaign against mechanical competition.

[125] For accounts of the early history of the phonograph industry, see Taubman, 165,000 Discs a Year, New York Times Magazine 20 (Dec. 8, 1946); Phonograph Records, 20 Fortune, No. 3, at 72 (1939); Maraniss, A Dog Has Nine Lives: The Story of the Phonograph, 193 Annals Amer. Acad. Pol. Sci. 8 (1937); Yorke, The Rise and Fall of the Phonograph, 27 Amer. Mercury 1 (1932); Expiration of the Berliner Talking Machine Patent, 106 Scientific American 52 (1912).

[126] The birth of the motion picture dates from Edison's demonstration of his kinetoscope in 1899. Mechanical pianos were introduced at least as early as 1890; the automatic phonograph came fifteen years later. Neither proved an outstanding success as a coin-operated machine, perhaps in part because the customer had no choice in selecting the number to be played. Letter from E. L. Hahne, treasurer of the Wurlitzer Company, Jan. 20, 1948. But both were employed by early motion picture exhibitors.

[127] International Musician 10 (Supp., June 1912).

[128] Including the contention that all theaters should be required to hire orchestras because of the traditional panic-quelling effects of music in event of fire. International Musician 8 (Aug. 1914); ibid., at 9 (Oct. 1915).

[129] The 1915 convention of the AFL adopted a resolution, introduced by AFM delegates, directing all AFL unions to "extend every possible assistance to the American Federation of Musicians in enforcing their demands on the employers of music where machines are placed." Proceedings of Thirty-fifth Annual Convention of the American Federation of Labor 197, 295 (1915).

[130] AFM By-Laws Art. IX, § 19 (1947).

That question was first judicially examined at a much later day (but in a similar setting) when the AFM invoked the assistance of the stagehands to prevent a traveling opera company from using phonograph records to supply the orchestral accompaniment for its performances. In that case, the New York Court of Appeals approved the issuance of an injunction, taking the occasion to announce the doctrine, which it later was to apply against the AFM again,[131] that any labor activity taken to achieve an objective which the court by some sort of intuitive inspiration should determine to be "unlawful" was both enjoinable at common law and outside the coverage of New York's "little Norris-LaGuardia Act."[132]

By the time the machine had been ousted from the motion picture theater, it was beginning to appear in a new form. The radio, previously employed only as a signaling device, was successfully used for voice broadcasting in 1920, and thus was introduced a new industry which today operates more than 1,472 standard (AM) broadcasting stations.[133] Almost immediately this industry was faced with the problem which it has not yet solved—what to use for program material. Recorded music offered one answer, and the broadcasters embraced it so enthusiastically that the radio station became little more than an extension of the phonograph. This development disturbed the Department of Commerce, which was attempting to regulate the industry by a system of licensing under the rather dubious authority of the Radio Act of 1912.[134] As the Department described the situation later:

> During the early days the programs of a majority of the stations consisted almost entirely of phonograph records. The announcers usually had favorite records which they repeated numerous times during a program. The Secretary of Commerce foresaw the danger of stations losing public interest if a change was not made in the programs.[135]

The Secretary sought to effect that change in 1922 by opening a new wave length to private broadcasters who would meet certain prescribed standards. Previously, all private broadcasting had been restricted to a frequency of 833 kilocycles, thus limiting each community to a maximum of one full-time station. By his new regulations, Secretary Hoover created

[131] American Guild of Musical Artists v. Petrillo, 286 N.Y. 226, 36 N.E. 2d 123 (1941), discussed in text at note 67 supra.

[132] Opera on Tour, Inc. v. Weber, 285 N.Y. 348, 34 N.E. 2d 349 (1941), motion to amend remittitur denied 286 N.Y. 565, 35 N.E. 2d 920 (1941), cert. den. 314 U.S. 615 (1941), rehearing den. 314 U.S. 716 (1942). The Court of Appeals had begun to lay the groundwork for this emasculation of the New York anti-injunction statute five years earlier; see The Decline of the New York Court of Appeals, 8 Int. Jurid. Ass'n Bull. 29 (1939).

[133] Hearings, op. cit. supra note 91, at 263.

[134] 37 Stat. 302 (1912).

[135] Annual Report, Chief of Radio Division, Department of Commerce 8 (1929).

a new Class B license to operate on 750 kilocycles, one of the conditions of the license being that mechanically operated musical instruments could not be used.[136] That restriction upon the holders of Class B licenses and the competition of such licensees with the holders of nonrestrictive licenses combined for a time to prevent excessive use of phonograph records on the air.

But even when not used in conjunction with the phonograph, the radio was not an unmixed blessing for the musician. True, by carrying music into the home it was helping to cultivate in each community the new market which the phonograph had opened.[137] But the radio-stimulated demand did not result in benefit to the musicians in each community, because the broadcasters soon introduced a new development.

The American Telephone and Telegraph Company inaugurated network broadcasting in 1923 when a program was broadcast simultaneously from its station WEAF (now WNBC) in New York and station WNAC in Boston by means of a connecting telephone line.[138] By the end of 1925 the A.T.&T. network served a chain of 26 stations, and the Radio Corporation of America had formed another chain based on its station WJZ in New York. From this beginning has grown a system of four nation-wide chains[139]—NBC, CBS, MBS, and ABC—and forty-five regional net-

[136] The original regulation provided that "mechanically operated musical instruments may be used only in an emergency and during intermission periods in regular programs." Bureau of Navigation, Radio Service Bulletin No. 65, at 11 (Sept. 1, 1922). One month later the regulation was amended to prohibit mechanical music entirely. Ibid., No. 66, at 8 (Oct. 2, 1922).

[137] During the early years of broadcasting the musicians, like all other performing artists, aided the cultivation of this new market by donating their services. Jome, The Economics of the Radio Industry 176 (1925).

[138] FCC, Report on Chain Broadcasting 6 (1941), hereafter cited as FCC Chain Report.

[139] The National Broadcasting Company was formed by RCA, General Electric Company, and Westinghouse Electric and Manufacturing Company in 1926 to take over the operation of the WEAF and WJZ chains, which it operated as the "Red" and "Blue" Networks. In 1930 RCA acquired full ownership of NBC. In 1933, as the result of an anti-trust consent decree, General Electric and Westinghouse disposed of their substantial stock interests in RCA; see United States v. Radio Corporation of America, 3 F. Supp. 23 (Del., 1933); FCC Chain Report 7–8.

United Independent Broadcasters, Inc., was formed in 1927 by impresario Arthur Judson, three associates, and the Columbia Phonograph Company. The Phonograph Company sold its interest after a few months, and in 1928 the William S. Paley family acquired the controlling interest which it still holds. In 1929 the name of the company was changed to Columbia Broadcasting System, Inc. FCC Chain Report 21.

Mutual Broadcasting System, Inc., was formed in 1934 by a group of radio station operators, and is controlled by the Chicago Tribune's station WGN and R. H. Macy Company's station WOR. FCC Chain Report 26–28.

As a result of its investigation of chain broadcasting, the FCC required NBC to dispose of one of its two networks. NBC elected to dispose of the "Blue" (WJZ) system, which was set up as a separate corporation in 1942 and sold in 1943 to Edward J. Noble, the candy Life-Saver

works[140] through which a single program can be broadcast simultaneously in more than 450 different communities.[141]

Thus, although radio originally carried greater promise than the phonograph for the instrumental musician—because it provided a means for him to reach the family home with his performance without putting that performance in such form that it could be repeated mechanically—much of what radio offered it soon took away with the development of chain broadcasting. Although the AFM is acutely aware of the restrictive effect of the network device upon the employment opportunities of its members, it has not yet devised a strategy to combat that effect. After the networks had made a new bid for local patronage by introducing the "co-op show"[142] —a network program with cued blanks for the insertion of local advertisers' blurbs—the Federation in September 1940 ordered its members not to participate in such shows. But that ban was lifted in December 1947 (perhaps because the producer of "Information Please" had filed unfair labor practice charges under the Taft-Hartley Act[143]); and new three-year contracts concluded between the network originating stations and AFM Locals in New York, Chicago, and Los Angeles in March 1948 expressly provide that musicians will perform on co-op programs.[144]

Meanwhile, the years which witnessed early developments in network broadcasting were marked by two other events which drastically affected the employment opportunities of musicians. One of these was the introduction of sound movies. Within a short time after Warner Brothers released "The Jazz Singer" in 1927, most of the motion picture theaters in the United States were equipped for sound, and 18,000 AFM members formerly employed to provide music for vaudeville and for silent films were out of work.[145] This sudden development caught the Federation com-

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king; see Radio Corporation of America, 10 FCC 212 (1943). In 1945 the name of the system was changed to American Broadcasting Company.

[140] Broadcasting Yearbook 334 (1948).

[141] As of January 1948 the four national networks had 1067 affiliates—ABC had 260, CBS had 164, MBS had 476, and NBC had 167. While most of these stations are affiliated with the networks only through contractual arrangements, ABC owns 5 stations, CBS owns 7, and NBC owns 6. Hearings, op. cit. supra note 91, at 258, 271, 280, 283.

[142] MBS introduced the co-op show in 1937. The four national networks now offer about fifty such shows. Newsweek 68 (Oct. 20, 1947).

[143] On the theory that the AFM ban on such programs constituted an illegal boycott under § 8(b)(4) of the Act. 21 Lab. Rel. Rep. 17 (1947).

[144] Variety, p. 38 (Mar. 24, 1948).

[145] Mermey, The Vanishing Fiddler, 227 No. Amer. Rev. 301 (1929); Hearings, op. cit. supra note 91, at 336, 405.

pletely unprepared. In 1927 President Weber had assured the membership that "a general danger to employment will not develop, as from present observation it appears that the public accepts the Vitaphone merely as a novelty."[146] When this prediction proved wrong, he essayed another: "It is the opinion of the Federation leadership, based upon exhaustive study, that mechanical music . . . will fail eventually to give satisfaction in any theater as a substitute for the appearance of artists in person."[147] And to accelerate public dissatisfaction with mechanical sound he persuaded the 1929 convention to authorize a nation-wide advertising campaign to expose the sound movie as an "anti-cultural development."[148]

Although the Federation's advertisements featuring robot musicians won commendation from experts,[149] the sound movie continued to thrive. And by the time it had become apparent that propaganda would not win the battle, the AFM was in a poor position to resort to anything else. A musicians' strike could not be called in the theaters—men must be employed before they can strike. While the supply of mechanical music could have been stopped at its source by calling a strike in the studios where sound pictures were made, the Supreme Court had held similar boycotts by the machinists' and stonecutters' unions enjoinable under the Sherman Act by limiting the union-exempting provisions of the Clayton Act to disputes between the striking employees and the struck employer,[150] and the Federation was unwilling to risk a federal injunction.[151] When the stagehands, already preoccupied with the problem of extending their jurisdiction over projection machines to include sound equipment, refused to call their members out of the theaters under the 1913 AFM–IATSE agreement, the AFM was without any effective means of combating the new mechanical competition.

Of course, while the advent of sound movies meant unemployment for many musicians throughout the country, it also meant that there would

[146] International Musician 23 (Oct. 1927).

[147] Ibid., at 1 (Feb. 1929).

[148] Ibid., at 18 (May 1929); ibid., at 1 (June 1929). And see Slichter, Union Policies and Industrial Management 211–13 (1941).

[149] "We have seen no more striking or convincing copy in any advertisement. . . ." Editor & Publisher 54 (Oct. 26, 1929).

[150] Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927). The boycotts involved in these cases were at the opposite end of the distribution process—the machinists and the stonecutters refused to work on printing presses and cut stone purchased from non-union producers—but the rationale of the Duplex and Bedford decisions would be equally applicable to a strike against a producer who sold his product to non-union customers.

[151] International Musician 10, 14 (June 1930).

be some augmentation of the 200-odd musicians employed by the producing studios to supply "mood music" for the inspiration of the actors. And on this relatively minor phase of the matter, the AFM was in a better position to represent its members. A few years earlier it had come to the aid of the stagehands, carpenters, electricians, and painters in their campaign to unionize the studios. It had also joined with them in the 1926 Studio Basic Agreement with the major producers, the chief feature of which is to provide for negotiation of studio contracts at an annual New York meeting between officers of the unions and representatives of the producers.[152] Through its negotiations at the national level under this agreement, the Federation has been able to initiate the quota system previously mentioned under which about 500 musicians are employed at annual salaries of not less than $6,900[153] to provide the music for pictures which play in more than 18,000 theaters with an aggregate weekly attendance exceeding 60,000,000.[154] And since 1938 it has sought to protect these musicians by requiring the producers to agree that sound tracks will be used only "to accompany the picture for which the music was performed" and will not be "disposed of, sold, leased, or used for any picture or purpose except to accompany a revival of the picture for which recordings were originally made."[155]

When the development of television suggested a new method for the use of sound films, additional provisions were inserted in the studio contracts to forbid the use of musical sound track for television broadcast without prior consent of the Federation.[156] Those provisions were included in two-year contracts negotiated in 1946 in the face of a Supreme Court decision which casts considerable doubt on their validity. *Allen Bradley Co. v. Local Union No. 3, IBEW*[157] found a violation of the Sherman Act in contracts entered into by the New York local of the electrical workers' union in order to create more employment opportunities for its members. The local had secured contracts with all electrical contractors in the New York City area providing that the contractors should recognize the closed shop and should purchase equipment from none but New York manufacturers who employed members of the local. Similar closed shop contracts had been made with the manufacturers, who agreed to confine their New

[152] Ross, Stars and Strikes 13–21 (1941).

[153] See text at note 97 supra.

[154] Variety, p. 9 (Apr. 28, 1948); Lindey, Motion Picture Agreements Annotated vii (1947).

[155] Ross, op. cit. supra note 152, at 206; Hearings, op. cit. supra note 68, at 506.

[156] Hearings, op. cit. supra note 68, at 199, 207, 232.

[157] 325 U.S. 797 (1945).

York City sales to contractors employing the local's members. The effect of these arrangements was not only to create more employment for the electricians but also to give the employers a monopoly on the sale and installation of electrical equipment in the New York City area. The Court found nothing in the Clayton or Norris-LaGuardia Acts or in its prior decisions construing those acts which would exempt the union's "combination with business groups" from the prohibition of the anti-trust laws. Apparently the agreements involved in that case constituted illegal combinations with business groups, as distinguished from legal collective bargaining agreements between union and employer, because they served to aid not only the union members in their competition for jobs but also the employers in their competition for markets. At least that seems to be the meaning of the explanation offered by the Court:

> Section 6 of the Clayton Act declares that the Sherman Act must not be so construed as to forbid the "existence and operation of labor, agricultural and horticultural organizations, instituted for the purposes of mutual help. . . ." But "the purpose of mutual help" can hardly be thought to cover activities for the purpose of "employer-help" in controlling markets and prices. . . .
>
> Since union members can without violating the Sherman Act strike to enforce a union boycott of goods, it is said they may settle the strike by getting their employers to refuse to buy the goods. Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local No. 3. We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other businessmen from that area, and to charge the public prices above a competitive level. It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. . . . But when the union participated with a combination of businessmen who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.[118]

If a labor agreement is legal or illegal depending upon whether the employer was compelled to enter into it by economic pressure from the union or was induced to enter into it because of the competitive advantages it offered him, a contract with the motion picture producers which restricts the supply of program material available for television broadcasting is certainly suspect. But it seems doubtful that the studio contracts will be

[118] Ibid., at 809.

tested under the *Allen Bradley* doctrine. Although great surprise was expressed in trade circles when the anti-television agreements were disclosed in congressional hearings last year,[159] their existence was a matter of public knowledge at the time the studio contracts were signed.[160] In addition, the major producers agreed with the AFM in August 1948 to renew the 1946 agreements for another year.[161] Yet neither the Department of Justice nor the television broadcasters have moved to invoke the anti-trust laws. So far, then, the AFM has been successful in its attempt to prevent further encroachment by sound motion pictures upon the musicians' employment opportunities.[162]

Not as graphic as the introduction of sound pictures, but of serious consequence to the musicians nonetheless, was the return of phonograph records to the radio. After two adverse decisions in the lower federal courts[163] and an opinion from the Attorney General advising that the Radio Act of 1912 gave him no authority to fix the wave length, time, or power at which a private broadcasting station might operate,[164] the Secretary of Commerce in 1926 abandoned all attempts to regulate private radio broadcasting.

The Federal Radio Commission, created in 1927 to take over that regulatory function, was unwilling to forbid the use of phonograph records as the Secretary had done, although it did not disagree entirely with his conclusions as to the desirability of such use. In view of its analysis of the matter, the Commission's position was rather indecisive:

> By its General Order No. 16, issued on August 9, 1927, the commission, while not condemning the practice of using mechanical reproductions such as phonograph records or perforated rolls, required that all broadcasting of this nature be clearly described in the announcement of each number. The commission has felt, and still feels, that to permit such broadcasting without appropriate announcement is, in effect, a fraud upon the public. It is true that in the smaller communities which do not have adequate original program resources, the use of phonograph records may fill a need; it is true also that there may be developments in specially produced records which can be made use of to advantage by radio. On the whole, however, the commission is

[159] Variety, pp. 1, 55 (July 2, 1947); ibid., p. 69 (July 9, 1947).

[160] See New York Times, p. 1 (Apr. 10, 1946); ibid., p. 30 (Apr. 11, 1946); ibid., p. 1 (Apr. 27, 1946).

[161] Variety, p. 18 (Sept. 1, 1948). The new contracts expire August 31, 1949.

[162] But foreign competition is appearing in a new form. The New York Daily News's new television station WPIX and the Chicago Tribune's WGN have arranged to televise a block of English films. 51 Time, No. 45, at 85 (May 10, 1948); ibid., No. 47, at 73 (May 24, 1948).

[163] Hoover v. Intercity Radio Co., 286 Fed. 1003 (App. D.C., 1923); United States v. Zenith Radio Corp., 12 F. 2d 614 (D.C. Ill., 1926).

[164] 35 Ops. Att'y Gen. 126 (1926).

inclined to believe that the use of ordinary commercial records in a city with ample original program resources is an unnecessary duplication of service otherwise available to the public, and the crowded channels should not be wasted in this manner. General Order No. 49, issued on October 26, 1928, makes more rigid requirements as to announcements of mechanical reproductions.[165]

The Radio Commission never advanced beyond this point in its regulation of the use of records. And the Federal Communications Commission, which succeeded it in 1934, has done no more than to make refinements upon the old policy.[166]

Extensive use of recorded music by radio stations did not follow immediately after the lifting of the government proscription because of the waning popularity of such music. Introduction of radio broadcasting at first appeared to mean the end of the phonograph industry. After the 1921 high of 100,000,000 records, sales had declined. Although Victor's introduction of an improved recording process under license from the Western Electric Company and Brunswick's development of the electric phonograph had caused a brief spurt of record sales to the 65,000,000 level in 1929, sales had dropped to 10,000,000 by 1932.[167]

At this low point, a number of events conspired to bring new life to the recording business. Swing music was introduced and it swept the country like wildfire. Soon after the Twenty-first Amendment reopened the tavern and the cabaret, the automatic phonograph supplied each of them with a "multi-selective" juke box. Decca Records Company Ltd. created an American subsidiary, Decca Records, Inc., to supply clamoring swing fans with a thirty-five-cent record.[168] Consolidated Film Industries, Inc., which had brought Columbia and Brunswick into its American Record Company through a failure to anticipate that the film sound track

[165] FRC, Annual Report 19 (1928).

[166] Current FCC regulations require the broadcaster of mechanical reproductions to identify them as such at least once for each record, twice if the program exceeds five minutes, or every 30 minutes if the program exceeds 30 minutes. 13 Fed. Register 422 (1948).

[167] Variety, p. 46 (Mar. 19, 1947); Phonograph Records, 20 Fortune, No. 3, at 72, 74–75 (Sept. 1939); Review of Reviews 99 (Jan. 1926).

[168] Standard & Poor's Corp. Records (C-E) 1451; Business Week 14 (Nov. 10, 1934). The English company disposed of its holdings in American Decca in 1938. Standard & Poor, supra, at 1450–51. Currently, 10 per cent of Decca's stock is held by the family of Jack Kapp, president of the company. Listing Statements, New York Stock Exchange, vol. 189, A-12567. Bing Crosby is also a stockholder, but the identity of the remaining owners of the American company is one of the secrets of the trade. Hearings, op. cit. supra note 91, at 210. Agreements by which American Decca, English Decca, and Electrical & Musical Industries, Ltd. have divided world markets form the basis of an anti-trust complaint filed in the District Court for the Southern District of New York August 3, 1948.

would early replace the record in sound movies, diverted a part of its production to a twenty-five cent record.[169]

The swing craze, the juke box, and the cheap record swept the recording industry back to prosperity,[170] and with its returning popularity recorded music returned also to the radio. But with the phonograph record the broadcasters now combined a new type of mechanical reproduction—the electrical transcription, a development of the Western Electric Company which made it possible to record a fifteen-minute program on a single sixteen-inch disc.

The transcription, first licensed for production in 1930,[171] opened a number of new possibilities for the use of recorded music which were soon exploited by the broadcasting industry. As the uses of the transcription came later to be classified in the jargon of the trade, the most important are: 1) "Tailor made" transcriptions, recording an entire program complete with sponsor's plugs. Such transcriptions may be made in advance of broadcast time, or the initial broadcast may be transcribed at the time of performance for subsequent rebroadcast. 2) "Open end" transcriptions, recording a complete program with blank spots for later insertion of announcements. 3) "Spot commercials," recording a commercial plug for incessant re-use in the manner made notorious by the Pepsi-Cola jingle.[172] 4) "Library" transcriptions, made without commercial plugs or blanks therefor, for use on sustaining programs.

So extensive has the use of transcriptions and phonograph records become that when in 1942 the FCC conducted a survey of 796 of the 890 standard stations then operating, it discovered that while 76 per cent of the broadcast time of the average station is devoted to programs containing music, over 55 per cent of those programs used recorded or transcribed music. Among the stations not affiliated with a network, even greater use was made of mechanical reproductions—230 of the 298 non-affiliated sta-

[169] Phonograph Records, 20 Fortune, No. 3, at 72, 100 (Sept. 1939); Hearings before Committee on Patents on S. 3047, H.R. 11420, and H.R. 10632, 74th Cong. 2d Sess., at 626 (1936). Acquisition of the Brunswick Record Corporation did not include the right to use the Brunswick name on records. That was retained by the Brunswick Radio Corporation and went with the purchase of the latter company from Warner Brothers by American Decca in 1941. Standard & Poor's Corp. Records (C-E) 1451.

[170] See Ulanov, The Jukes Take Over Swing, 51 American Mercury 172 (1940).

[171] To Sound Studios of New York, a subsidiary of the World Broadcasting System. Kendrick, Recorded Radio Programs, 143 Scientific American 304 (1930).

[172] An electrical transcription can be played from 500 to 2,000 times—the ordinary phonograph record is good for only 100 to 150 playings. Phonograph Records, 20 Fortune, No. 3, at 72, 102 (Sept. 1939).

tions relied on recorded music for over 80 per cent of their musical programs.[173]

Alarm over this widespread resort to mechanical music is not confined to the musicians. It is shared by at least some of the networks. The small radio station which otherwise might be driven to a network contract by the dearth of local talent has in many cases been able to fill out its broadcasting hours with recorded music. Moreover, the electrical transcription affords a means for nationwide broadcasting of an entire program without resort to the networks.[174] Recognizing the threat of such competition, NBC in 1934 began gradually to eliminate all recorded programs on the stations which it operates. CBS soon adopted the same policy, and today recorded or transcribed shows are not broadcast over either network.[175] Such are the paradoxes of modern business practice that NBC felt constrained to adopt this policy although its parent, RCA, had purchased the Victor Talking Machine Company in 1929[176] and had entered the transcription business in 1934, and CBS, despite its similar policy, acquired the American Record Corporation (now Columbia Record Corporation) in 1938 and entered the transcription field in 1940.

Despite the AFM's growing concern over the extent to which mechanical music was being used, the first action to be taken by musicians with respect to such use was not taken by the Federation; nor was it a move inspired by fear of unemployment. Some of the musicians who make the records opened a campaign to increase their earnings from recorded performances.

Early in 1934 a Philadelphia lawyer, Maurice J. Speiser, published a translation of a French text on the legal rights of performing artists.[177] Al-

[173] Hearings before Subcommittee of Committee on Interstate Commerce pursuant to S. Res. 286, 77th Cong. 2d Sess., at 18–21, 26 (1942). For an example of the extreme extent to which some of the non-network stations rely upon recorded music, see Cannon System, Ltd. (KIEV), 8 FCC 207, 208 (1940).

[174] Keystone Broadcasting System, Inc., formed in 1940 to exploit the network-like possibilities of the electrical transcription, now serves 333 stations with two hours of transcribed sustaining programs per day. Broadcasting 74 (May 24, 1948). And the Frederick W. Ziv Company has twenty-three open-end transcribed shows which are heard on two-thirds of the radio stations in the country. Business Week 68–69 (June 21, 1947).

[175] Both networks make exceptions to this policy during periods of daylight saving time to allow the transcribing of complete programs for subsequent rebroadcast by affiliated stations in different time zones. Last summer both experimented with tape recorders, which seem destined eventually to replace the electrical transcription. Variety, p. 40 (Mar. 24, 1948); Newsweek 31 (May 3, 1948).

[176] Operated first as RCA Victor Company, Inc., and later as RCA Manufacturing Corporation, the recording business has been conducted as RCA-Victor Division since 1942. Standard & Poor's Corporation Records (P-S) 2082.

[177] Homburg, Legal Rights of Performing Artists (1934).

though the American copyright statute had never been construed to extend to the phonograph record or to the performance recorded on it,[178] Speiser added an "Addendum" to his translation in which he argued that the courts might be persuaded to recognize a legal interest for the performer in the recorded performance under one or more of four theories: 1) The common law afforded the literary artist protection against the unauthorized publication of his work, and this doctrine might be extended to cover musical performances. Since the "common law copyright" did not survive publication, however, Speiser concluded that this theory held scant promise. 2) In *International News Service v. Associated Press*[179] the United States Supreme Court had extended the common-law concept of unfair competition to prohibit a competitor's unauthorized use of uncopyrighted news collected by the Associated Press, and Speiser thought that a similar extension should be made to cover a radio station's unauthorized use of the musician's recorded performance, since the station in selling its recorded programs to advertisers was competing with the musician who sought to sell the advertiser live programs. 3) Ever since Warren and Brandeis had published their treatise on the "right to privacy" in 1890[180] the phrase had been recurring in legal literature, and the concept had found some judicial support. Although Speiser listed this theory as a possibility, he concluded that "it is extremely doubtful whether today it is of any aid to the performer." 4) Under a doctrine of "moral right," continental jurisprudence affords the artist protection which enables him, among other things, to prevent use of his work in such manner as to injure his artistic reputation.[181] Speiser suggested that a similar notion might be developed at common law to protect the performer against the use of imperfect recordings.

Within a few months after publication of this dissertation, the National Association of Performing Artists was organized, with Fred Waring as

[178] Section 4 of the Copyright Act of 1909, as amended, provides: "The works for which copyrightability may be secured under this Act shall include all the writings of an author." 17 U.S.C.A. § 4 (Supp., 1947). Section 5 lists thirteen categories of copyrightable works, including photographs and motion pictures, but makes no reference to phonograph records. Although Section 5 concludes with a proviso that "the above specifications shall not be held to limit the subject matter of copyright as defined in section 4," 17 U.S.C.A. § 5 (Supp., 1947), the Copyright Office is probably correct in concluding that the statute was not intended to confer a copyright upon either the recorder or the performer. See Chafee, Reflections on the Law of Copyright, 45 Col. L. Rev. 719, 734–735 (1945).

[179] 248 U.S. 215 (1918).

[180] Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

[181] See Roeder, The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators, 53 Harv. L. Rev. 554 (1940).

president and Maurice J. Speiser as general counsel, and with membership open to any "actor, singer, conductor, instrumentalist, lecturer, and any other interpretative artist or performer."[182] This organization now claims over 800 members, including such AFM members as Paul Whiteman, Eddie Duchin, Jascha Heifetz, Andre Kostelanetz, Ray Noble, Arturo Toscanini, and Guy Lombardo, and such non-instrumental musicians as Al Jolson, Bing Crosby, Richard Crooks, and Lawrence Tibbett.[183]

Soon after its formation, NAPA set out to test Speiser's legal theories, selecting a Pennsylvania court for its forum and offering the following evidence for its case: In 1932 Fred Waring and his incorporated orchestra (in which Waring owned all but two qualifying shares of stock) recorded for Victor two currently popular songs, receiving $250 for each recording. Anticipating that these records might be used for radio broadcast, Waring stipulated with Victor that they should be labeled: "Not licensed for radio broadcast."[184] After the records were made they were sold by Victor to its dealers, and by the latter to individual purchasers at a retail price of seventy-five cents each. Radio station WDAS purchased such records and in July 1935, after making the identifying announcements required by FCC regulations, broadcast them on a sustaining program.[185] At the time of this broadcast, Waring's orchestra was under exclusive radio contract to the Ford Motor Company at $13,500 per week.

On this showing, the Pennsylvania Supreme Court in *Waring v. WDAS Broadcasting Station, Inc.*[186] affirmed a trial court order granting an injunction against unauthorized use of the Waring records. Its decision, rendered in a flush of pioneering zeal,[187] drew support from all of Speiser's

[182] Hearings, op. cit. supra note 169, at 675.

[183] Hearings before Subcommittee of Committee on Judiciary on H.R. 1269, H.R. 1270, and H.R. 2570, 80th Cong. 1st Sess., at 8, 209 (1947). A similar organization, the American Society of Recordings Artists, was incorporated in California in 1934 with Al Jolson as President. NAB Reports 1495 (Sept. 1, 1936). Three years later it was merged with the Waring organization. Letter from Maurice J. Speiser, Dec. 16, 1947.

[184] Victor's recording license from the publisher of the songs also required Victor to place such a legend on the label. The composer's copyright includes the power to require separate licenses for publication, recording, and public performance for profit. 17 U.S.C.A. § 1 (Supp., 1947). Usual trade practice is for the composer to assign both the publishing and the recording rights to a music publisher and to assign the performance rights either to the American Society of Composers, Authors and Publishers formed in 1914 for that purpose, or to Broadcast Music, Inc., an organization formed by the broadcasting industry in 1939 during its battle with ASCAP over royalty rates for performance rights.

[185] WDAS had secured a performing license from ASCAP, since radio broadcasting is considered public performance for profit. Witmark v. Bamberger, 291 Fed. 776 (D.C. N.J., 1923), and cases cited in Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931).

[186] 327 Pa. 433, 194 Atl. 631 (1937).

[187] "The problems involved in this case have never before been presented to an American or an English court. . . . Sound can now be mechanically captured and reproduced, not only

theories and embraced Professor Chafee's notion of equitable servitudes on chattels as well.[188] A majority of the court thought that the musical performers' interpretation of the composer's work, at least where the performers were Waring's orchestra, constituted "such novel and artistic creation" as to "elevate interpretation to the realm of independent works of art" entitled to the protection of common-law copyright. Although this interpretation was the work of a number of musicians, no problem arose in allowing Waring alone to invoke protection for it, since he owned the corporation by which the musicians were employed. With the question whether the placing of that interpretation on records for general public sale constituted a "publication" which the common-law copyright would not survive,[189] the court had more difficulty. It observed, accurately enough, that a distinction is taken between a "limited" publication, which does not affect the copyright, and a "general" publication, which terminates it.[190] Then, disregarding the point that this distinction turns upon the extent to which the work has been made available to the public, rather than upon the form of its dissemination,[191] and brushing aside as "comparatively early" those cases which had held restrictions on the use to be made of the work by its purchasers ineffective to save the common-law right,[192] the court concluded that, in view of the restrictive label on the Waring records, there had been no "general" publication.

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by means of the phonograph for an audience physically present, but, through broadcasting, for practically all the world as simultaneous auditors. Just as the birth of the printing press made it necessary for equity to inaugurate a protection for literary intellectual property, so these latter-day inventions make demands upon the creative and ever-evolving energy of equity to extend that protection so as adequately to do justice under current conditions of life." Ibid., at 435, 632.

[188] Chafee, Equitable Servitudes on Chattels, 41 Harv. L. Rev. 945 (1928), suggests the doctrine as a means whereby the manufacturer who sells his goods to dealers, thus escaping the business risks of retailing them himself, may nonetheless retain control over the retailer's resale practices and over the use to which the goods are put by purchasers from the retailer.

[189] Thus, Dr. Holmes's common-law copyright in "The Autocrat of the Breakfast Table" did not survive serial publication in the Atlantic Monthly so as to enable his executor to enjoin another from publishing it in book form. Holmes v. Hurst, 174 U.S. 82 (1899).

[190] "Limited" publication is found in the exhibition of a painting, American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907), the production of a play, Ferris v. Frohman, 223 U.S. 424 (1911), and the public performance of a musical composition, McCarthy & Fisher, Inc. v. White, 259 Fed. 364 (D.C. N.Y., 1919), as distinguished from unrestricted circulation of copies of the painting, drama, or musical score.

[191] Holmes v. Hurst, 174 U.S. 82 (1899).

[192] Larrowe-Loisette v. O'Loughlin, 88 Fed. 896 (D.C. N.Y., 1898) (unrestricted sale of printed lectures with stipulation that purchaser was not to show his copy to anyone else); Wagner v. Conrad, 125 Fed. 798 (D.C. N.Y., 1903) (unrestricted sale of musical score with reservation of stage production rights); Savage v. Hoffman, 159 Fed. 584 (D.C. N.Y., 1908) (same); Jewelers' Mercantile Agency v. Jewelers' Publishing Co., 155 N.Y. 241, 49 N.E. 872 (1898) (unrestricted leasing of credit reports with stipulation that lessee was not to show his copy to anyone else).

The novelty of the court's treatment of the publication question probably resulted from its failure to consider that point apart from its consideration of an alternative ground of decision. Prior cases finding a "general" publication were rejected by the court as being based "upon an assumed doctrine that restrictions and servitudes cannot be judicially recognized when imposed as conditions attaching to the sale of chattels." The court further held that the restrictive legend in this case was not in restraint of trade or otherwise contrary to public policy (a consideration which is irrelevant when the restriction is viewed merely as evidence of the extent of dissemination of his work which the artist has authorized). Out of this rather confused discussion emerged the conclusion that the restrictive label imposed a servitude on the use of the record which was enforceable in equity.

The same majority of the court, and one more judge who concurred on this ground alone, found a third basis for its decision in the law of unfair competition. Reliance here was almost entirely on the *Associated Press* case, a precedent whose current status is rather dubious.[193] The court had no difficulty in finding that Waring and WDAS were competitors for the business of advertisers and that to allow WDAS to use Waring's performances at a cost of seventy-five cents per selection, even on a sustaining program, might unfairly jeopardize his continuing ability to sell those performances for $13,500 per week. And the court bolstered its conclusions on this point with certain considerations smacking of the doctrine of "moral right": It found that Waring's reputation might be damaged both by the broadcasting of records made before the orchestra had reached its present state of artistic proficiency and by the incessant broadcasting of any of its recordings.

Judge Maxey, concurring separately, argued—and cited the fathers of the doctrine to prove it—that the real basis for the protection accorded the artist was to be found in the right of privacy. Here Judge Maxey seemed to be laboring under the same sort of conceptualistic cloudiness that characterized the majority's treatment of the common-law copyright question. True, Warren and Brandeis had suggested that the artist's right to privacy left it to him "to decide whether that which is his shall be given to the public" and "to fix the limits of the publicity which shall be given," but there is nothing in their position to support Judge Maxey's conclusion that Waring could make copies of his performance available to all who cared to buy, yet retain the right to specify the use which the purchasers

[193] State and lower federal courts have been reluctant to apply the Associated Press doctrine to analogous situations. See Chafee, Unfair Competition, 53 Harv. L. Rev. 1289, 1309–15 (1940); Baer, Performer's Right to Enjoin Unlicensed Broadcasts of Recorded Renditions, 19 N.C.L. Rev. 202, 208–10 (1941).

could make of those copies. "The right is lost . . . when the author himself communicates his production to the public."[194]

But, whatever the imperfections in its dialectic, the Pennsylvania court had provided the performing artist with some legal basis for the collection of royalties on the commercial use of his recordings,[195] and NAPA set about to get similar decisions in other jurisdictions. Before the decision on appeal in the *WDAS* case had come down, NAPA had met defeat in two other cases. Because of its inability to show that Frank Crumit had required Decca to use the restrictive label which appeared on his records, NAPA was unable to enjoin their use by a broadcaster in New York.[196] And a similar attempt to enjoin the use of Ray Noble's records in a tap room in Massachusetts failed because Noble had assigned to RCA "all rights in and to the matrices and records" and hence was held to have no standing to claim any interest in the recorded performance.[197]

Neither of these difficulties arose in *Waring v. Dunlea*,[198] a suit to enjoin a North Carolina radio station from using electrical transcriptions made by Waring and bearing notices that they were to be used only on the Ford Motor program. Although this presented an ideal case for the application of the common-law copyright doctrine (the transcription never having been made available to the public), the rather jumbled opinion accompanying the injunction seems to be based on a blend of the concepts of unfair competition and equitable servitude.

By this time the broadcasters had turned to legislative halls. The North Carolina legislature immediately enacted a statute cancelling the *Dunlea* decision,[199] and the same statute was adopted in South Carolina shortly thereafter[200] and in Florida two years later.[201]

The recording companies were also developing an interest in the matter. When NAPA brought an action in the federal district court in New York

[194] Warren and Brandeis, op. cit. supra note 180, at 198–99.

[195] Although station WDAS stopped using Waring records after this decision, NAPA has not so far employed the decision to exact royalties from Pennsylvania broadcasters. Letter from Leslie W. Joy, General Manager, WDAS Broadcasting Station, Inc., Feb. 5, 1948.

[196] Crumit v. Marcus Loew Booking Agency, 162 N.Y. Misc. 225, 293 N.Y. Supp. 63 (1936).

[197] Noble v. One Sixty Commonwealth Ave., Inc., 19 F. Supp. 671 (Mass., 1937).

[198] 26 F. Supp. 338 (N.C., 1939).

[199] N.C. Code Ann. (Mitchie, 1939) § 5126(s): "When any phonograph record or electrical transcription, upon which musical performances are embodied, is sold in commerce for use in this state, all asserted common law rights to further restrict or to collect royalties on the commercial use made of such recorded performances by any person is hereby abrogated and expressly repealed."

[200] 3 Code of Laws of S.C. (1942) § 6641. [201] Fla. Stat. Ann. (1943) §§ 543.02, 543.03.

in the name of Paul Whiteman to enjoin the use of Whiteman's records by radio station WNEW, RCA filed an ancillary bill seeking similar injunctive relief plus an adjudication that Whiteman had no interest in the records. The case was submitted on RCA's bill and on evidence showing that all RCA records issued since 1932 had borne legends stating that they were not to be used for radio broadcast or were not to be used commercially, that prior to 1934 Whiteman's contract with RCA had assigned to the latter all "rights and equities . . . in and to the matrices and records," and that since 1934 the contract specified that RCA "does not acquire the right to manufacture or sell, or otherwise dispose of, records for broadcasting."

The District Court held 1) that Whiteman had a common-law copyright in his performance which he had assigned to RCA on records made prior to 1934, but which he had retained on all records made after that time, 2) that there was no common-law copyright in the records themselves which RCA could claim by virtue of its contribution to their production, 3) that the issuance of records bearing the restrictive label after 1932 constituted a "limited" publication only, so that the common-law copyright in the performances recorded thereon had survived, and 4) that in any event the broadcasting of records, regardless of the restrictive label, constituted unfair competition as against both Whiteman and RCA.[202]

On appeal, the Circuit Court of Appeals for the Second Circuit found all of this unpersuasive. Assuming for the purpose of its decision that Whiteman had a common-law copyright in his performance and, "what is far more doubtful," that RCA had a similar copyright in the recording, the court held that such rights were lost with the issuance of the records for public sale and that the restrictive labels would not operate either to limit the publication or to impose an equitable servitude. Nor did it view this case as an instance of unfair competition—*International News Service v. Associated Press* was to be confined to its particular facts. As for "the strange assertion that to broadcast the records in some way invades somebody's 'right of privacy'—presumably Whiteman's," the court found it hardly worthy of mention. More difficult was the problem presented by the fact that the Supreme Court of Pennsylvania had reached a contrary decision. That decision established the law in Pennsylvania,[203] and it meant that the broadcasting of Whiteman's records would constitute a

[202] RCA Manufacturing Co. v. Whiteman, 28 F. Supp. 787 (N.Y., 1939).

[203] Although the court here recognized that the matter is one of state law, it did not purport to examine the New York decisions in reaching its own conclusions. Had it done so, it would have encountered some of the few cases lending support to Professor Chafee's doctrine of equitable servitudes. See Baer, op. cit. supra note 193, at 206.

tort in that state. But there was no way in which WNEW could route its broadcasts around Pennsylvania, and the court finally concluded that it would not enjoin an otherwise lawful broadcast in order to prevent commission of a tort in Pennsylvania.[304]

NAPA's dismay at this reversal must have been shared by the recording companies, because immediately after RCA's victory in the district court, RCA, Columbia, and Decca had served notice on the broadcasters that they must purchase licenses to use their records.[305] Those claims were abandoned after the circuit court's decision had deprived the recording companies of any support as a matter of common law, although a then recent Supreme Court decision provided an entirely separate basis for their claims in the law of patents. In *General Talking Pictures Corp. v. Western Electric Co.*[306] the Supreme Court upheld the licensing system of a patent pool consisting of A.T.& T., General Electric Company, and RCA, whereby some retailers were licensed to sell patented amplifying tubes only for radio use and others were licensed to sell them only for non-radio use. The Court also affirmed the holding that one who purchased amplifying tubes for use in talking picture equipment from a retailer known to the purchaser to be licensed to sell only for radio use was guilty of contributory infringement. Phonograph records issued by RCA, Columbia, and Decca had long carried on their labels a legend reading:

> Licensed by Mfr. under U.S. Patents [citing numbers] only for non-commercial use on phonographs in homes. Mfr. and original purchaser agree that this record shall not be resold nor used for any other purpose.

Hence, the *General Talking Picture* case seems apt precedent in support of the demands which the recording companies originally predicated on the district court's decision in the *Whiteman* case. Nevertheless, whether from lack of confidence in their patents, from doubts about the attitude of the new Justices toward the *General Talking Picture* case[307] and the doctrine

[304] RCA Manufacturing Co. v. Whiteman, 114 F. 2d 86 (C.C.A. 2d, 1940), cert. den. 311 U.S. 712 (1940).

[305] NAB Reports 3652 (Aug. 11, 1939); ibid., at 3665 (Aug. 18, 1939); ibid., at 3849 (Nov. 20, 1939); Pforzheimer, Copyright Protection for the Performing Artist in His Interpretative Rendition, ASCAP Copyright Law Symposium 9, 20 (1939).

[306] 304 U.S. 175 (1938), opinion on reargument 305 U.S. 124 (1938), rehearing den. 305 U.S. 675 (1939).

[307] The original decision in the case was 5 to 1, with Justice Black dissenting and Justices Roberts, Cardozo, and Reed not participating. On reargument, the decision was 5 to 2, Justice Cardozo having died, Justice Roberts again not participating, and Justice Reed joining Justice Black in dissent. Within a year after the decision on reargument, Justice Brandeis had retired and Justice Butler had died, leaving only Chief Justice Hughes and Justices McReynolds and Stone of the majority still on the Court.

of contributory infringement,[208] or from other considerations of business policy, the recording companies made no attempt to enforce their patent notices, and those notices have recently disappeared from Victor and Columbia labels.

Although the *Whiteman* case is the last NAPA effort to reach reported court decision, NAPA has not abandoned its attempt to secure royalties for the recording artist. Since 1936 it has had bills to give the performer a statutory copyright continuously before Congress, and the Scott Bill was introduced in the 80th Congress for that purpose.[209]

As long as it is the national policy to give a statutory copyright to the compilers of telephone directories[210] and citators,[211] the musical performer's plea for copyright can hardly be rejected on "artistic" grounds. And the fact that the Constitution authorizes Congress to "promote the Progress of Science and useful Arts by securing for limited Times to *Authors* and Inventors the exclusive Right to their respective *Writings* and Discoveries"[212] has not been thought to prevent an award of statutory copyright on such non-written works as photographs[213] and motion pictures.[214] A more serious difficulty is that of deciding who should receive the copyright. Rarely is a recorded musical performance the work of one man. At the very least it embodies the work of an orchestra, and usually it includes the contribution of one or more vocalists. Because of the number of people involved in any one performance and because the composition of even the most established orchestras is continually changing, a copyright shared by all participants in the performance would soon prove so unwieldy as to be unworkable. And few orchestras other than Waring's are incorporated.[215] The simplest solution, of course, would be to give the copyright to the recording company,[216] and this course has been recommended because

[208] See Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944), rehearing den. 321 U.S. 802 (1944), motion to clarify den. 323 U.S. 672 (1944).

[209] H.R. 1270, 80th Cong. 1st Sess. (1947). Like all its predecessors, this bill died in committee.

[210] Leon v. Pacific T.&T. Co., 91 F. 2d 484 (C.C.A. 9th, 1937).

[211] Shepard v. Taylor, 193 Fed. 991 (C.C.A. 2d, 1912).

[212] U.S. Const. Art. I, § 8 (clause 8; italics added).

[213] Burrow-Giles Lithographic Co. v. Saxony, 111 U.S. 53 (1884).

[214] MGM Distributing Corp. v. Bijou Theater, 3 F. Supp. 66 (Mass., 1933).

[215] As part of its attempt to relieve the musician of the taxes imposed on "employers" under the social security laws (see note 53 supra), the AFM in 1941 adopted a rule forbidding incorporation of bands and orchestras. AFM By-Laws Art. X, § 58 (1947).

[216] One consequence of giving a copyright to English record manufacturers has been that the English Musicians' Union, which is as well organized and as opposed to mechanical music as the AFM, has reached agreements with the recording companies whereby BBC is required

of its simplicity,[217] but it hardly seems calculated to bring the benefits of the copyright to the musical performer. At one time NAPA included an express provision in its bill giving the copyright to the orchestra leader,[218] and while strategy has dictated omission of that provision in subsequent bills, NAPA still favors that arrangement.[219] But NAPA's membership is made up only of orchestra leaders and vocalists well enough established to be able to protect their interests. There is little reason to believe that the instrumentalists in the orchestra would derive much benefit from a copyright awarded to the conductor.

Although considerably more complex than either of the above solutions, the only plan which offers protection to all of the musical performers seems to be one which gives an interest in the copyright to each of them but requires all to assign their interests in each recorded performance to one who would hold the copyright as agent only for licensing purposes. Just as the music publishers have as a matter of practice become the assignees of the composer's recording rights, and ASCAP and Broadcast Music, Inc., the assignees of his performance rights, it may reasonably be assumed that trade practice would eliminate problems arising out of numerous performers' copyright interests in different recordings by channeling all assignments of those interests to a few licensing agents. And the performer could be protected against abuses to which the composer has been subject by a provision in the statute limiting the compensation of the licensing agent.

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gradually to reduce the amount of broadcasting time devoted to phonograph records to a maximum of ten hours per week. The Economist 132 (July 24, 1948).

[217] Pforzheimer, op. cit. supra note 205, at 31. It has also been suggested that the copyright should be given to the record manufacturer because he is "the entrepreneur who brought together capital, artistic talent and technical necessities," Littauer, The Present Legal Status of Artists, Recorders and Broadcasters in America, 3 Geistiges Eigentum 217, 233 (Holland, 1938), and because in an analogous situation statutory copyright has already been given to the producer of motion pictures. Diamond and Adler, Proposed Copyright Revision and Phonograph Records, 11 Air L. Rev. 29, 49 (1940); Hess, Copyrightability for Acoustic Works in the United States, 4 Geistiges Eigentum 183, 197–98 (1939). Neither these proposals nor the suggestion that copyright be given to the recorder with a statutory requirement that a certain proportion of the royalty fees be paid to the performer, 49 Yale L. J. 559 (1940), makes any attempt to explain how promotion of progress in science and useful arts requires the award of copyright for the practice of a process already the subject of patent.

[218] H.R. 6160, 76th Cong. 1st Sess. (1939).

[219] Witness the following colloquy from hearings on the Scott Bill:

"Mr. Walter: Mr. Spieser, if H.R. 1270 became a law, would not every musician in a band be entitled to copyright his individual contribution to the interpretation of a musical piece?

"Mr. Speiser: That would be true, sir. . . . But we would regulate by assignment. The person entitled would be the conductor of the band or the orchestral association under whose charter the band is performing. . . . The particular technicalities, sir, are of minor importance. . . . Due precaution would be taken before filing application of a copyright." Hearings, op. cit. supra note 183, at 211.

In any event, the only definite observation that can be made about the latest version of NAPA's proposal on this point is that it is impossible to determine from its provisions where the copyright would be lodged.[220] The Scott Bill would have granted a copyright on "recordings which embody and preserve any acoustic work in a fixed permanent form on a disk, film, tape, record, or any and all other substances, devices, or instrumentalities, by any means whatever, from or by means of which it may be acoustically communicated or reproduced." The copyright would have carried the exclusive right not only to "make or to procure the making" of such recordings, but also to "publish and vend such recordings of sound; and to communicate and reproduce the same acoustically to the public, for profit." But nowhere was the holder of such copyright identified. Although NAPA's purpose is clear, that purpose was not made explicit in the bill.

But, whatever the form of the bill, NAPA has strong opposition to overcome. Leading that opposition, of course, are the National Association of Broadcasters and the manufacturers and operators of juke boxes.[221] ASCAP, which had provided testimony for Waring in the *WDAS* case, has changed its mind and joined Broadcast Music, Inc., the Songwriters' Protective Association, and the Music Publishers' Association in opposition—too many copyrights may clog the sale of musical works.[222] No change has occurred in the position of the recording companies. Their view now, as in 1936, is that copyright protection should by all means be extended to recordings, but that the copyright should be given to the recording company.[223] They present the same argument which the district court rejected as a basis for common-law copyright in the *Whiteman* case: The technique of the recorder in operating the recording equipment is

[220] Because of this and other ambiguities the Copyright Office concluded that "whatever may be the merits of granting copyright to acoustic recordings, there are so many technical defects in the bill that the Copyright Office should not recommend it." Ibid., at 263–66.

[221] Juke boxes are now exempted from the composer's right to collect royalties on public performances of his work for profit by a proviso in the Copyright Act that "the reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs." 17 U.S.C.A. § 1(e) (Supp., 1947). But ASCAP is sponsoring a bill to eliminate this exemption, H.R. 2570, 80th Cong. 1st Sess. (1947), and NAPA, anticipating the possibility of the performer acquiring a copyright, has a similar bill, H.R. 1269, 80th Cong. 1st Sess. (1947).

[222] Hearings, op. cit. supra note 183, at 16–19, 25–51, 72–77, 84–86. Since the NAPA bill is not confined to musical recordings, it is also opposed by the Authors' League of America. Ibid., at 279–83.

[223] Hearings, op. cit. supra note 169, at 622–25, 631–45, 1363–67; hearings, op. cit. supra note 183, at 63–69, 285–91.

fully as important to artistic creation as is the performance of the musician,[224] and if the copyright is given to the record manufacturer he "can then be free to share with the performer in any compensation which he receives for the use of that record."[225]

Least decisive of all interested parties in its attitude toward NAPA's campaign has been the AFM. In 1936 it appeared in support of the NAPA bill;[226] in 1937 it made a financial contribution to NAPA[227] and adopted a rule providing for the expulsion of "any member who assigns any property right in any recording to any recording company, or to any other party without the consent of the American Federation of Musicians";[228] and President Weber reported to the 1940 convention that the AFM was still supporting NAPA's efforts to amend the copyright laws.[229] But since that time the Federation has maintained a discreet silence on the entire matter.

Fundamentally, of course, NAPA's program is in conflict with the Federation's policy on recorded music. The AFM, as representative of all the musicians, is opposed to their displacement by mechanical reproduction, despite the fact that a few of its members are able to find employment in the making of such reproductions.[230] Any action which it may take in opposition to the use of mechanical music will be contrary to the interests of those few members, and the only effect of NAPA's campaign to increase the value of those interests must be to lessen the enthusiasm of such members for the Federation's policy.

But, while the AFM has vacillated in its attitude toward NAPA, it

[224] The broadcasters' reply to this argument is that their studio engineers make a similar contribution in "mixing" a musical show at the time of broadcast. Ibid., at 81–82. Hearings, op. cit. supra note 183, at 81–82.

[225] Ibid., at 53.

[226] Hearings, op. cit. supra note 169, at 662–64, 668–72.

[227] Hearings, op. cit. supra note 183, at 664.

[228] AFM By-Laws Art. X, § 57 (1947).

[229] International Musician 7 (June 1940). New York Local 802, which has a high proportion of recording musicians in its membership, made a financial contribution to NAPA in 1940. Hearings, op. cit. supra note 183, at 664.

[230] According to trade estimates, only about 5,000 AFM members derive any substantial amount of income from recording and transcribing work. Of this number, 500 in New York and another 500 in Hollywood supplement such employment with performances on live radio shows, and their combined income runs from $12,000 to $20,000 annually. The remaining 4,000 are the musicians in "name bands" who earn about $1,000 annually from recording and transcribing engagements. About fifteen or twenty of the leaders of these bands have been able to get provisions in their recording contracts giving them royalties. Variety, p. 1 (Oct. 22, 1947), ibid., p. 43 (Oct. 29, 1947). The AFM corroborates the 5,000 figure, but claims that the average musician, excluding orchestra leaders, earns less than $400 per year from recording engagements. Hearings, op. cit supra note 91, at 335, 390.

launched its own campaign against the use of recorded music shortly after NAPA began its suit in the *WDAS* case. The initiative came from Chicago Local 10, which announced early in 1937 that after February 1 of of that year it would not permit its members to make recordings or transcriptions except under such conditions as the Local's executive board should deem best calculated to "end for all time the menacing threat of canned music competition."[231] And in June of the same year a number of resolutions calling for similar action by the Federation were referred by the national convention to the Executive Board with full power to act on the matter.[232]

Armed with this authority, the national officers entered into negotiations with the broadcasters and emerged with agreements requiring radio stations approximately to double their expenditures for staff musicians during the next two-year period.[233] Shortly thereafter, the AFM required each of the recording and transcription companies, as a condition to further performance by AFM members, to operate under a yearly "license" issued by the Federation. The terms of this license, which seems to have been designed solely for the purpose of capitalizing on the *WDAS* decision, required the licensee to label every transcription with a legend restricting its use to the specific purpose for which it was made, and to label every phonograph record with a statement that it was "only for noncommercial use on phonographs in homes."[234]

These arrangements settled the AFM's relations with the recording industry and the broadcasters for a time, but while negotiations with the broadcasters for renewal of the quota agreements were pending in 1939, Assistant Attorney General Thurman Arnold published a statement listing the trade-union practices which the Department of Justice considered

[231] International Musician 3 (Jan. 1937). Cessation of the use of all mechanical music had been one of the demands accompanying a strike called by Local 10 against Chicago radio stations in 1931, but the strike was settled without any concession from the broadcasters on that point. Hearings, op. cit. supra note 173, at 16.

[232] International Musician 1 (Aug. 1937).

[233] Each of the national network originating stations in New York, Chicago, and Los Angeles was required to increase its expenditures by $60,000 annually. All other stations affiliated with networks undertook an annual aggregate increase of $1,500,000. Unaffiliated stations whose gross income for 1937 exceeded $20,000 agreed to spend an annual sum equal to 5½ per cent of the amount by which that gross income exceeded $15,000. None of these agreements fixed wage scales for the staff musicians—that was left to negotiations between the stations and the various AFM Locals. Hearings, op. cit. supra note 75, at 91–101; Hearings, op. cit. supra note 173, at 16; NAB Reports 3807 (Nov. 3, 1939).

[234] AFM Standing Resolutions 52 (1938). Although no wage scales were specified in the license, most of the recording bands are traveling bands, and for that reason the Federation has fixed recording and transcribing rates at the national level since 1929.

"unquestionable violations of the Sherman Act." Included in the list were "unreasonable restraints designed to compel the hiring of useless and unnecessary labor."[235] As will later appear, that advice proved poor prophecy,[236] but it was enough at the time to arouse doubts in AFM councils as to the wisdom of negotiating another quota agreement on a national scale, and President Weber advised the Locals early in 1940 to seek their own terms with the broadcasters.

Since that time, negotiations for staff musicians have been conducted between the Locals and the individual stations,[237] with the Locals attempting not only to secure wage increases commensurate with rising living costs but also to obtain their own quota agreements in order to prevent reduction in employment. Data collected by the FCC indicate that they have not been completely successful. In 1940 the four national networks and 765 standard stations employed 2,237 staff musicians at average weekly salaries of $60.[238] In 1945 nine networks and 876 standard stations employed 2,220 staff musicians at average weekly salaries of $81.[239] In 1947 seven networks and 924 standard stations employed 1,939 staff musicians at average salaries of $87.[240] And the three-year contracts concluded between AFM Locals and network originating stations in March 1948—which set the pattern for the industry—provide for no increase in quotas or in compensation.[241]

The above figures, it should be noted, do not give the full picture on the employment of musicians in the broadcasting industry. The AFM estimates that its members are currently earning $23,000,000 a year from radio.[242] On the basis of an FCC survey for the week beginning February 1, 1947, it appears that the broadcasters paid about $8,767,000 to their 1,939 staff musicians last year, and paid another $2,777,000 to employ 1,423 part-time musicians.[243] The AFM estimate would leave ap-

[235] Department of Justice Press Release, Nov. 20, 1939, reprinted in Hearings, op. cit. supra note 173, at 62–64 and in Arnold, The Bottlenecks of Business 249–53 (1940).

[236] See United States v. International Hod Carriers and Common Laborers District Council, 313 U.S. 539 (1941), discussed in text at note 259 infra.

[237] But the national officers of the AFM participate in negotiations between Locals and network originating stations in New York, Chicago, and Los Angeles.

[238] FCC, Statistics of the Communications Industry in the United States for the Year Ended December 31, 1940, at 140 (1942).

[239] NAB Reports 63 (Jan. 28, 1946).

[240] FCC, Public Notice 8304 (June 23, 1947).

[241] Variety, p. 38 (Mar. 24, 1948). The new contracts run until January 31, 1951.

[242] Hearings, op. cit. supra note 68, at 228; Hearings, op. cit. supra note 91, at 337.

[243] FCC, Public Notice 8304 (June 23, 1947).

proximately $11,456,000 as the earnings of musicians who are employed for specific programs and are paid by the advertising agencies or the program sponsors rather than by the station operators. But the total number of musicians employed full-time or part-time to supply music for programs reaching more than 70,000,000 radio sets[244] probably does not exceed 6,000, and the average local station employs "less than ½ of a full time musician."[245]

While the Locals were dealing with the problem of employment in the broadcasting station, new vigor was brought to the AFM's national leadership with the retirement in 1940 of 74-year-old President Joseph Weber and the election of James C. Petrillo as his successor. Petrillo immediately imposed the ban on cooperative radio programs and initiated the boycotts which resulted in the unionization of the Boston Symphony Orchestra and the bringing of all American Guild of Musical Artists instrumental and conductor members into the AFM.[246] Then he addressed himself to the problem of the phonograph record and the transcription.

From the 1941 national convention he secured authority to take action against mechanical music,[247] and in June 1942 he notified the recording and transcription companies that their AFM licenses, which expired August 1, would not be renewed. Although he subsequently offered to permit AFM members to make records for home use only, the recording companies disclaimed any power so to limit their use, and on August 1 the musicians stopped making records.[248]

Reaction to this move was cataclysmic. The Federation and its President became, almost overnight, subjects of nation-wide interest. Editorial writers and columnists throughout the land labored their readers with impassioned dissertations on "dictatorship," "labor czars," and "musical Hitlers." Elmer Davis, as Director of the Office of War Information, fanned the flames by injecting patriotism into the controversy. He announced that "the elimination of records . . . for use in restaurants, can-

[244] Hearings, op. cit. supra note 91, at 9, 53.

[245] FCC, Public Service Responsibility of Broadcast Licensees 39 (1946), popularly and unpopularly known as the FCC "Blue Book" and hereafter so cited.

[246] See Countryman, The Organized Musicians: I, 16 Univ. Chi. L. Rev. 56, 70–71 (1948). Petrillo also initiated negotiations resulting in 1942 in the termination of the AFM–IASTE agreement, which had been of little value to the AFM for the past twenty years and which operated to restrict the employment opportunities of AFM members because of IASTE'S lengthy unfair list. International Musician 1 (Apr. 1942).

[247] Ibid., at 1 (Aug. 1941).

[248] Although the musicians continued for a time to make transcriptions which were used only once by any one station, the recording ban was extended to cover such transcriptions early in September 1942.

teens and soda parlors where members of the armed forces go for recreation, and for use in factories where war workers use juke boxes for organized relaxation" would seriously jeopardize morale "in the critical months ahead—months which may well decide the fate of this country's war effort," and that elimination of transcriptions would jeopardize the existence of "several hundred" small radio stations and thus "seriously interfere with the communication of war information and messages vital to the public security." Consequently, he called upon Petrillo "on behalf of the people of the United States and on behalf of the War Department, the Navy Department, the Marine Corps, the Coast Guard, the Treasury Department, the Office of Civilian Defense, and the Office of War Information," to end the recording ban.[249]

The fact that the AFM's recording ban did not have the effect of "eliminating," or even diminishing, the production of phonograph records,[250] but operated only to prevent the recording of new musical compositions after August 1, in no way diminished the effectiveness of the Davis letter or the indignation occasioned by the Federation's refusal to comply with the Davis request.

When AFM leaders, with characteristic lack of diplomacy, compounded their sins by demanding that NBC cease broadcasting the performances of student musicians from the National Music Camp, government agencies were stimulated to action. The Senate Committee on Interstate Commerce launched inquiries into AFM activities.[251] The FCC conducted a survey of the radio industry and reported to the Senate committee that 167 of the 890 standard stations then operating would probably be unable to continue without recorded and transcribed music.[252] The Department of Justice brought an injunction action under the anti-trust laws.

The Senate inquiry inspired several bills aimed at AFM practices,[253]

[249] Letter from Davis to Petrillo, July 28, 1942, reprinted in Hearings, op. cit. supra note 173, at 6–7.

[250] From their existing stock of matrices the recording companies continued to press and sell as many records as they could get material to manufacture under War Production Board quotas. In 1944 a War Labor Board panel found that "the number of pressings has been limited only by the supply of material and mechanical labor." Electrical Transcription Manufacturers, 16 War Lab. Rep. 369, 378 (1944).

[251] Hearings, op. cit supra note 173; Hearings before Subcommittee of Committee on Interstate Commerce pursuant to S. Res. 81, 78th Cong. 1st Sess. (1943) (unpublished); Hearings, op. cit. supra note 89.

[252] Hearings, op. cit. supra note 173, at 33. The FCC prediction was based upon the fact that these 167 stations used recorded or transcribed music for more than 80 per cent of their musical programs and that their net income before taxes was less than $5,000.

[253] S. 2874, 77th Cong. 2d Sess. (1942) (recording ban); S. 1332, 78th Cong. 1st Sess. (1943), (recording ban); S. 1957, 78th Cong. 2d Sess. (1944) (student broadcasts); H.R. 1648 and S. 63, 79th Cong. 1st Sess. (1945) (student broadcasts).

two of which, designed to forbid interference with student broadcasts, successfully passed the Senate,[254] but Congress' preoccupation with questions of greater importance precluded definitive legislative action during the war. Meanwhile, the Department of Justice went to trial in its anti-trust suit.

At the outset, the Department was confronted with a rather formidable body of precedent. Since 1932 the Norris-LaGuardia Act[255] had forbidden the federal courts to issue injunctions in labor disputes, and had defined "labor dispute" to include "any controversy concerning terms or conditions of employment . . . whether or not the disputants stand in the proximate relation of employer and employee." Two years before the recording ban, in *Milk Wagon Drivers' Union v. Lake Valley Co.*,[256] the Supreme Court had decided that this Act meant that no injunction should be issued in a labor dispute even though it was sought on the ground that the union's activity violated the Sherman Act. And the Court had found that a labor dispute existed even though the milk wagon drivers' union sought to compel dairy operators to cease using "independent vendors" and to hire union drivers to distribute their products, by picketing the retail stores which purchased milk from the "independent vendors" rather than by action taken directly against the dairy operators whose labor practices it sought to change.

Then there was the *Hutcheson* case.[257] Since the suit against the AFM was not a criminal action, the government was not here concerned with the mental gymnastics which Justice Frankfurter had employed to revive the Clayton Act's exemption from criminal prosecution without disturbing the decision[258] which had destroyed that exemption. But the *Hutcheson* decision had also found a labor dispute where the carpenters' union sought to compel operators of a brewery to take certain work from the machinists and give it to the carpenters by calling strikes against the brewery, a construction company employed by the brewery, and a construction company employed by one who leased certain properties from the brewery, by picketing both the brewery and its lessee, and by boycotting the brewery's product.

Finally, there was the case of the *Hod Carriers*, prosecuted under the Sherman Act for calling a strike against certain construction companies

[254] S. 1957 and S. 63, op. cit. supra note 253.

[255] 47 Stat. 70 (1932), 29 U.S.C.A. § 101 et seq. (1947).

[256] 311 U.S. 91 (1940).

[257] United States v. Hutcheson, 312 U.S. 219 (1941), discussed in text at note 150 supra.

[258] Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

to compel the companies either to cease using concrete truck-mixers or to hire standby employees whenever the truck-mixers were used. After a district court had dismissed the indictment in that case, the Supreme Court had affirmed without opinion on the authority of the *Hutcheson* decision.[259]

These decisions pretty well bracketed the AFM case. The government's complaint alleged that the purpose of the recording ban was to compel radio stations to cease using records and transcriptions and to compel hotels, restaurants, taverns, cabarets, etc., to cease using juke boxes.[260] On this theory the AFM, like the unions of the milk wagon drivers, the carpenters and the hod carriers, was seeking more work for its members. Like those unions, it sought to eliminate competition in its labor market. Like the unions of the milk wagon drivers and the carpenters, it resorted to a secondary boycott rather than to activity directly aimed at those whose labor practices it sought to affect. Like the hod carriers, it was resisting technological change rather than live competition. The only significant difference between the AFM case and any of those already decided was one which seemed to bring the dispute more clearly within the Norris-LaGuardia Act: Unlike some of those against whom union activity was directed in the *Milk Wagon Drivers* and *Hutcheson* cases, the recording and transcription companies were employers of union members.

With the law in this discouraging state, Assistant Attorney General Arnold offered a twofold argument in support of his complaint:[261] 1) He argued that the AFM's recording ban had nothing to do with terms and conditions of employment. The apparent contradiction of the *Milk Wagon Drivers* case was ignored.[262] The *Hutcheson* case was said to be distinguishable because it "involved only a jurisdictional strike." As for the *Hod Carriers* case, "no contractors were forced out of business. An unnecessary charge was imposed which could be and was collected. In the instant case the unnecessary charge was complete prohibition and was aimed at the elimination of smaller networks and smaller radio stations." 2) Relying

[259] United States v. International Hod Carriers and Common Laborers District Council, 313 U.S. 539 (1941).

[260] The complaint also included allegations based upon the National Music Camp incident and upon a strike called by the AFM against the Don Lee Broadcasting System, a regional network, to compel one of the stations affiliated with the network to hire more musicians.

[261] Statement as to Jurisdiction, Docket No. 670, October Term, 1942, Supreme Court of the United States.

[262] Compare the statement in the majority opinion in that case: "To say . . . that the conflict here is not a good faith labor issue, and therefore there is no 'labor dispute,' is to ignore the statutory definition of the terms; to say, further, that the conditioned abandonment of the vendor system, under the circumstances, was an issue unrelated to labor's efforts to improve working conditions, is to shut one's eyes to the everyday elements of industrial strife." Milk Wagon Drivers' Union v. Lake Valley Co., 311 U.S. 91, 99 (1940).

on a dictum in the *Hutcheson* opinion (later to be confirmed in the *Allen Bradley* decision) that the Sherman Act would apply should a union "combine with nonlabor groups," he argued that "the union seeks a combination with manufacturers of phonograph records and electrical transcriptions to prevent independent radio stations and networks from acquiring such records and to prevent small amusement places from buying such records, thereby eliminating competing forms of musical production." But this argument includes the contention that the AFM sought to induce the transcription manufacturers to combine against their only customers and to induce RCA and CBS as manufacturers of records and transcriptions to conspire against themselves as broadcasters. Further, it could have been argued with exactly as much force that the hod carriers were seeking to combine with the construction companies against the manufacturers of truck-mixers and that the milk wagon drivers were seeking to combine with the dairy operators against the "independent vendors." And any union activity aimed at the elimination of non-union employees or employees affiliated with a different union, as in the *Hutcheson* case, would constitute an attempt to combine with the employer against such employees. In essence, then, this was merely another way of putting the first argument—union activity aimed at eliminating competition in the labor market has nothing to do with "terms and conditions of employment" within the meaning of the Norris-LaGuardia Act.[263]

The district court found these arguments insufficient and dismissed the complaint. On appeal the Supreme Court was able to dispose of the case summarily,[264] citing the *Milk Wagon Drivers* decision and *New Negro Alliance v. Sanitary Grocery Co.*[265] The latter case did not involve the Sherman Act but had found a labor dispute within the meaning of the Norris-LaGuardia Act where an organization of Negroes picketed a grocery store to compel it to abandon its "whites only" employment policy and hire Negro clerks.

Four days before the Supreme Court's decision was announced, the AFM offered to terminate the recording ban, which had then been in effect for six months, if the recording and transcription companies would agree to pay fixed royalties to the Federation for each record and tran-

[263] The rule later announced in the Allen Bradley case seems clearly inapplicable here, since the manufacturers of records and transcriptions have no economic interest in withholding their product from radio and juke box use. In fact, all of the major record manufacturers consider the disc jockeys such stimulators of record sales that they supply them with free records. Variety, p. 41 (Sept. 3, 1947).

[264] United States v. American Federation of Musicians, 318 U.S. 741 (1943).

[265] 303 U.S. 552 (1938).

scription made by AFM members. The sums so collected were to be used "for the purposes of reducing unemployment which has been created in the main by the use of the above-mentioned mechanical devices and for fostering and maintaining musical talent and culture and music appreciation; and for furnishing free, live music to the public."[266] The companies, however, refused to consider any such arrangement—not because of its cost, but because, out of a sudden concern for the union membership, they objected to contributing to any fund to be "disbursed in the Union's uncontrolled discretion," and because of the "dangerous fallacy" in the underlying assumption "that a specific industry owes a special obligation to persons not employed by it—an obligation based only on such persons' membership in a union."[267]

Instead, anti-trust remedies having failed, they took their case to the War Labor Board under the War Labor Disputes Act of 1943.[268] But while the WLB hearing was proceeding before a three-man panel, a break occurred in the hitherto solid ranks of the companies. Decca, producer of one-fourth of all phonograph records in the United States,[269] entered into a contract with the Federation. Furthermore, Decca brought with it the World Broadcasting System, the largest manufacturer of library transcriptions (whose stock Decca had recently acquired[270]), and WOR Recording Studios, chief transcription manufacturer for MBS.

This contract, to run until December 31, 1947, constituted a complete capitulation to the Federation's royalty demands.[271] "In order to give effect to the principle of a continuing interest which all members of the Federation have in the use of recordings containing instrumental music," the companies agreed to pay royalties ranging from one-fourth cent on a

[266] Hearings, op. cit. supra note 75, at 106.

[267] Ibid., at 76.

[268] 57 Stat. 163 (1943), 50, App. U.S.C.A. § 1503 (1944). This Act gave the Board jurisdiction over any "labor dispute" which might lead to "substantial interference with the war effort." The Board found the recording ban to constitute such a labor dispute and set the case down for panel hearing in Electrical Transcription Manufacturers, 10 War Lab. Rep. 157 (1943).

[269] At the conclusion of its hearings the WLB panel found that Decca, Columbia, and Victor "issue practically all of the phonograph records in the United States. The annual production of the three companies is about 130,000,000 records, of which 56,000,000 are made by Victor; 39,000,000 by Columbia; and 35,000,000 by Decca." Electrical Transcription Manufacturers, 16 War Lab. Rep. 369, 372 (1944).

[270] Standard & Poor's Corporation Records (C-E) 1451. In August 1948 Decca sold World to Frederick W. Ziv Company, largest manufacturer of open-end transcriptions. Broadcasting 22 (Aug. 9, 1948).

[271] A copy of the contract is set out in NAB, Special A. F. of M. Bulletin 22 (Oct. 1, 1943), and in International Musician 1 (Oct. 1943).

thirty-five-cent record to 2½ per cent of the sale price of records selling for more than $2.00. On electrical transcriptions the royalty was 3 per cent of the companies' gross revenue from sale, lease, or license of such transcriptions, except that transcriptions which were used only once by any one station were royalty-free. It was also provided that if the AFM should subsequently enter a contract with other companies "upon terms more favorable or different" from the Decca contract, the signatories to the Decca contract could cause their agreement "to be conformed therewith."

Within a month twenty-two small record and transcription manufacturers had signed the Decca contract, and four more large transcription companies had signed a second contract[272] patterned after the Decca agreement but containing two additional provisions available to the Decca signatories under the most-favored-company clause of their agreement: 1) The AFM agreed not to seek an increase in wage scales prior to October 1945.[273] 2) It was specifically provided in the contract that the royalty payments should be kept by the AFM in a separate fund and used "only for purposes of fostering and propagating musical culture and the employment of live musicians, members of the Federation."

Although the "Four Companies" contract was soon accepted by seventy-six more small recording and transcription companies, RCA and Columbia refused to enter into any such agreement, and the WLB proceedings continued. In March 1944 the panel issued its report, a lengthy document written by public member Arthur S. Meyer and substantially concurred in by employer member Gilbert E. Fuller, wherein the dispute received its first consideration on the merits. Although Meyer was not impressed by the companies' position that as a matter of principle they could not agree to make payments into a fund to be controlled by the Federation, a principle upon which he thought the companies stood "a little painfully," he found: 1) that the union had failed to prove that the phonograph, the transcription, or the radio had "decreased the employment of musicians"; 2) that although not more than one-third of the AFM membership was able to find full-time employment as musicians, the remaining two-thirds were able to supplement part-time musical work

[272] A copy of this contract is set out in NAB, Special A.F. of M. Bulletin 23 (Oct. 29, 1943), and in International Musician 16 (Nov. 1943).

[273] Wage scales at that time were $10 per hour for popular records (not more than four 10-inch or three 12-inch matrices to be made in three hours), $14 per hour for classical records (not more than forty minutes playing time per hour), and $18 per hour for electrical transcriptions (not more than one fifteen-minute transcription per hour). AFM By-Laws Art. XV (1941). In October 1946 the Federation secured increases which brought the rates to $13.75 for popular records, $19.25 for classical records, and $27.00 for electrical transcriptions. AFM, Wage Scales, Rules and Regulations Applying to Recordings and Transcriptions 3-5 (1946).

with other employment or to find full-time employment in other fields, and, at least during a war-time manpower shortage, the union could not ask for more; and 3) that even if an unemployment problem did exist, the War Labor Disputes Act authorized the WLB only to prescribe "wages and hours and all other terms and conditions (customarily included in collective bargaining agreements) governing the relations between the parties," and a royalty provision such as that demanded by the AFM was not "customary." Accordingly, the panel recommended, with labor member Max Zaritsky dissenting, that the Board direct termination of the recording ban and restoration of conditions prevailing on July 31, 1942.[274]

For all Meyer's painstaking care, his report seems to miss the point of the Federation's case. It is obvious that the phonograph, considered apart from its use on radio and juke box, did not decrease the employment opportunities of musicians—it did just the opposite. Hence, it was not surprising that the panel could discover President Weber saying in 1926 (while Secretary Hoover's licensing plan was keeping recorded music off most radio programs and before the introduction of the modern juke box) that the phonograph record had "advanced the development of the love of music among the people . . . and the result was an increase of employment opportunities for musicians."[275] Although the panel report was critical of the union's failure to submit data in support of its position, the ultimate logic of the Federation's position is that the phonograph record and the transcription have been used by radio stations and operators of small amusement places to fill a demand which otherwise would have created more jobs for live musicians. Obviously, no amount of investigation will prove that there would be more employment for musicians today if the phonograph and the radio had never been invented. Nor could the Federation muster statistics to show how many more jobs for live musicians would be made available if there were no juke boxes and if records and transcriptions were not used on the radio. It is apparent that the elimination of the juke box and the recorded radio program would in some measure increase the job opportunities of live musicians. That, in final analysis, is the Federation's contention, and years of surveying and statistics-gathering will not give it added weight or precision. But the panel did not recognize that contention, and its report did not deal with it.

In any event, the WLB did not follow the panel's recommendation. It accepted the principle of the union-administered royalty fund which the companies found so distasteful, and it ordered immediate termination of

[274] Electrical Transcription Manufacturers, 16 War Lab. Rep. 369, 370 (1944).

[275] Ibid., at 380.

the recording ban and settlement by arbitration of the amount and disposition of royalty payments.[276]

But the AFM, with a large part of the battle won, was in no mood to arbitrate, and it refused to comply with the Board's order. The only compulsion, aside from adverse publicity, which the War Labor Disputes Act provided for enforcement of the order was seizure of the business concerned in the event that the Economic Stabilization Director found "that the war effort will be unduly impeded or delayed" by continuance of the dispute. Accordingly, when two months of extremely adverse publicity had failed to daunt the Federation, the Board referred the case to Stabilization Director Vinson, who concluded, reasonably enough, that continuation of the recording ban against RCA and Columbia would not unduly impede or delay the war effort. President Roosevelt then wired Petrillo, informing him of the Director's decision, but calling on the union in the name of patriotism and citizenship to comply with the Board's order voluntarily.[277] The Federation refused to accede to this request, pointing out that it had already reached agreements with 105 recording and transcription companies under which recordings had been made for the past year, and that under the most-favored-company clause an arbitration award on terms more favorable to RCA and Columbia might deprive it of part of the benefits of those agreements.[278]

The new flurries of editorial indignation caused by this defiance of governmental authority may have brought comfort to RCA and Columbia, but it brought no recording profits. And Jascha Heifetz's switch from RCA-Victor to Decca[279] was an omen of even greater long-run loss. Finally, two days after the 1944 Presidential election and almost twenty-seven months after the initiation of the recording ban, RCA and Columbia capitulated and signed the royalty contract, bringing the record industry back to full production.

With the end of the war, that industry entered a new era of prosperity. In 1945 it sold 165,000,000 records,[280] by 1946 it had raised the figure to 275,000,000,[281] and the 1947 output was 350,000,000.[282] A concomitant of such prosperity is, of course, the rise and fall of numerous new producers, and there are today literally hundreds of small recorders either in opera-

[276] Ibid., at 369.

[277] New York Times, p. 1 (Oct. 5, 1944).

[278] Ibid., p. 1 (Oct. 11, 1944).

[279] Ibid., p. 14 (Oct. 5, 1944).

[280] Taubman, op. cit. supra note 125, at 20.

[281] As Crosby Goes, So Goes Chopin, 35 Fortune, No. 5, at 146 (May 1947).

[282] Lunde, The American Federation of Musicians and the Record Ban, 12 Pub. Op. Quar. 45, 46 (1948).

tion or in the process of going in or out of business.[283] Nonetheless, RCA-Victor, Columbia, Decca, and Capitol Records, Inc.—a newcomer which entered the record and transcription fields in 1942[284]—account for over 80 per cent of the entire record production.[285]

With the industry in this flourishing state, the Federation had collected $3,700,000 in royalties by the end of 1947, and the AFM Executive Board, acting under directions from the national convention,[286] distributed $1,130,000 among the Locals in 1947 according to a plan designed to accommodate both the employment needs of the Locals and the musical needs of the smaller communities.[287] With that allocation, supplemented in some instances by contributions from the Locals and from civic organizations and local government units, the musicians provided some 10,000 musical performances in ballrooms, concert halls, veterans' hospitals, and parks. These performances, which were divided almost evenly between popular and classical music, employed more than 30,000 musicians and played to audiences in 514 communities. A similar schedule of performances in 1948 was financed by a second allotment of $1,736,000 from the royalty fund.[288]

Meanwhile, having acquiesced in the continued use of recorded music on the air, the Federation sought to invoke the principle it once had applied to the motion picture theaters—that the music machine should be operated by a member of the union. As president of Local 10, Petrillo had in 1928 converted Chicago radio stations to the practice of employing AFM members as platter-turners. But in other stations that work was done by announcers or studio engineers; in the network-owned stations it was done by the engineers. In January 1944, however, the AFM reached

[283] Sturdiest of the new entrants is MGM, which spent $4,000,000 to convert a Bloomfield, New Jersey, war plant into a record factory, arranged to have its domestic distribution handled by the Zenith Radio Corporation and its foreign distribution by Electrical and Musical Industries, Ltd. (which does the same job for Columbia and RCA-Victor), and entered production in March 1947. As Crosby Goes, So Goes Chopin, 35 Fortune, No. 5, at 146 (May 1947); Variety, p. 39 (Aug. 13, 1947).

[284] Capitol was formed by songwriter Johnny Mercer, movie producer Buddy DeSylva, and Hollywood music store proprietor Glenn Wallichs.

[285] In terms of the number of records sold, it is estimated that RCA-Victor accounted for 27 per cent of the 1947 output, Decca 25 per cent, Columbia 23 per cent, and Capitol 8½ per cent. Lunde, op. cit. supra note 282, at 46.

[286] AFM By-Laws Art. I, § 10 (1947).

[287] Each Local received $10.43 per member except the New York, Chicago, and Los Angeles Locals, which received $10.43 for each of the first 5,000 members and $2.00 for each additional member.

[288] New York Herald Tribune, § 2, p. 2 (Jan. 25, 1948); Hearings, op. cit. supra note 106, at 417.

agreements with the four national networks whereby they undertook to transfer their platter-turning work to AFM members. But before these agreements could be put into effect, the National Association of Broadcast Engineers and Technicians, an unaffiliated union representing the engineers employed in NBC and Blue (ABC after December 30, 1944) network stations, instituted representation proceedings before the National Labor Relations Board. On the basis of past bargaining history, the NLRB certified NABET as collective bargaining representative for units including platter-turners in NBC and Blue stations, and the only consequence of the AFM's insistence that the networks nonetheless comply with their contracts with the Federation, and of its belatedly-filed charge that NABET was company-dominated, was a court order requiring the two networks to bargain with NABET.[289] Since the established bargaining practice at other stations varied only in the identity of the unions whose members did the platter-turning work,[290] the AFM abandoned its attempt to secure such work for its members outside of Chicago and turned its attention to other technological problems which arose with the end of the war.

One such problem was the post-war growth of television, which has progressed from an experimental operation in 1941 to a commercial enterprise which now boasts 39 operating stations, 85 construction permits granted, and 310 applications pending.[291] Whether this new industry means more or less employment for musicians is not yet clear. If listener preference has any effect on the content of programs, television may prove a boon to the AFM membership. Certainly a televised version of today's disc-jockey program will have little audience appeal. And if television proves an effective competitor of the motion picture,[292] the musician

[289] NLRB v. NBC, 150 F. 2d 895 (C.C.A. 2d, 1945).

[290] NABET also represents the engineers employed at Mutual's station WOR and at some 50 other stations throughout the country. Letter from Harry E. Hiller, Executive Secretary, NABET, Apr. 9, 1948. The engineers at CBS-owned stations are represented by the International Brotherhood of Electrical Workers (AFL). Elsewhere, the engineers are represented either by the IBEW or by the CIO's American Communications Association. Announcers, who act as platter-turners on some stations, are represented by the American Federation of Radio Artists (AFL).

[291] Television Magazine 2 (Apr. 1948); Television Boom, 37 Fortune, No. 5, at 79 (May 1948); Hearings, op. cit. supra note 91, at 164.

[292] There is already some evidence of hedging on this score. Paramount Pictures operates two television stations, has applied for three more, and has acquired a 30 per cent interest in Allen B. DuMont Laboratories, Inc., which operates two stations. Warner Brothers and Twentieth Century-Fox have television applications pending before the FCC, and Twentieth Century-Fox is currently negotiating for the purchase of ABC, which owns one television station and has thirteen television affiliates. Television Boom, 37 Fortune, No. 5, at 79, 194–96 (May 1948); Variety, p. 3 (Apr. 21, 1948); ibid., p. 5 (May 12, 1948); 51 Time, No. 51, at 77 (June 21, 1948). New York Times, p. 33 (Nov. 24, 1948).

should benefit from the fact that the new medium, even though operating through network arrangements, must offer its audience a far greater number of performances than does the movie industry.[293] On the other hand, television will constitute new competition for the legitimate theater, the ballroom, the concert hall, and standard broadcasting—all of which now offer employment opportunities for musicians. Moreover, the AFM may not be able to keep movie film out of the television studio indefinitely.

Confronted with this tangle of possibilities, AFM leaders were unable to decide whether to welcome television or to combat it, and they finally reached the rather ostrich-like conclusion that until they could learn more about it they would have nothing to do with it. Accordingly, they announced in February 1945 that Federation members would not play for any television broadcast "until further notice."[294]

"Further notice" was not given for three years. Then, without having gained a thing by their television ban, and apparently without even having formed any ideas about what they expected to gain, AFM leaders lifted the ban in new contracts concluded with the network originating stations last March and shortly thereafter, in order to assist the "infant industry," agreed on wage scales for television broadcasts which are considerably lower than those applicable to standard broadcasting.[295]

A somewhat more understandable but similarly bootless policy was pursued by the Federation with respect to FM broadcasting, which had gotten a fair start before the war and which has expanded rapidly since wartime restrictions on building were removed.[296] Insofar as FM broadcasting meant the opening of new originating stations,[297] it provided new

[293] During the 1946–47 season, motion picture producers released 313 features, excluding westerns. Box Office 28 (Nov. 15, 1947).

[294] International Musician 1 (Feb. 1945).

[295] Under a six-month contract concluded April 29, 1948, the scale for local television originations is ¾ the local rate for standard broadcasting; for network originations it is ½ the standard rate; for duplicated standard-television broadcasts, the prevailing standard scale for the program is to be increased by $3.75 for sustaining programs and $7.50 for sponsored programs. It was also agreed that filmed records of a live television network show may be made for "single use over any station which is affiliated with the network at the time of the original telecast." This contract covers network-owned stations only. Television rates for all other stations are negotiated with the appropriate AFM local. International Musician 6–7 (May 1948).

[296] At the close of the war there were forty-eight FM stations in operation. FCC, Twelfth Annual Report 15 (1946). By September 1948 this number had grown to 640, with an additional 388 authorized, and 97 applications pending. FM and Television 44 (Sept. 1948).

[297] In addition to its advantages of near-perfect fidelity and static-elimination, FM eases the frequency shortage which previously restricted the number of stations which could operate, making it technically possible to have from 3,500 to 5,000 additional stations. Siepmann, Radio's Second Chance 240 (1946).

opportunities for musical employment. But to the extent that FM stations were to be operated by the standard broadcasters[298] as additional outlets for existing programs,[299] no new employment would result. To combat the latter tendency, the AFM notified the broadcasters in October 1945 that its members would not perform for any program broadcast simultaneously over AM and FM outlets unless a standby orchestra was employed.[300]

But while the AFM was fashioning its post-war strategy, the post-war Congress had fashioned the Lea Act,[301] and subsection (a)(3) of that Act, making it unlawful to attempt to compel a radio station "to pay or agree to pay more than once for services performed,"[302] was clearly drawn to fit the Federation's demand for standbys on duplicate AM-FM broadcasts. Without more, it seems apparent that this provision was violated by the AFM for more than a year after the Lea Act was passed. But there is more:

> (c) The provisions of subsection (a) and (b) of this section shall not be held to make unlawful the enforcement or attempted enforcement, by means lawfully employed, of any contract right heretofore or hereafter existing or of any legal obligation heretofore or hereafter incurred or assumed.

Hence, if the contracts between the AFM Locals and the radio stations contained provisions requiring payment of standby charges whenever a program was broadcast simultaneously over AM and FM outlets, there would be no violation of the Act.

But the contracts then in existence, which were renewed for one year in January 1947, were "absolutely silent on the question of frequency modulation."[303] Despite this fact, it was reported by *Variety*, a usually well-informed trade sheet, that the networks had persuaded the Department of Justice that their contracts brought the AFM within the protec-

[298] Of 380 FM stations operating in January 1948, 293 were operated by AM licensees, and 437 additional AM licensees were either building FM stations or had applied to the FCC for construction permits. Hearings, op. cit. supra note 91, at 73, 263.

[299] The FCC originally planned to require AM licensees who acquired FM licenses to devote at least two hours per day to new and original programs, but receded from that position in the face of outraged protests from the AM broadcasters. Siepmann, op. cit. supra note 297, at 244–46.

[300] Hearings, op. cit. supra note 91, at 68. With this move was coupled another blow at an old menace—the AFM refused to accept any new engagements on FM networks. This ban affected the Continental Network and twelve regional FM networks. Ibid., at 27, 67, 126.

[301] 60 Stat. 89 (1946), 47 U.S.C.A. § 506 (Supp., 1947).

[302] See Countryman, The Organized Musicians: I, 16 Univ. Chi. L. Rev. 56, 80–82 (1948).

[303] Testimony of Joseph H. Ream, executive vice-president of CBS. Hearings, op. cit. supra note 91, at 297.

tion of subsection (c) of the Lea Act,[304] and network officials recently took that position before a congressional committee. NBC's Executive Vice-President Frank E. Mullen undertook to explain to the committee how these contracts, which said nothing about duplicate AM-FM broadcasting, nonetheless covered the matter completely:

> When we came up to the negotiations of our 1947 agreement . . . the contract was extended for a year, with the only subject discussed being wages and working conditions.
>
> That was by agreement with the union, and was the matter of negotiation, and even though it is not referred to in the contract, . . . it was clearly understood by both sides that our contract did not cover it.
>
> Therefore, our lawyers, I think, are quite right in advising us now that the contract does not cover FM and if we duplicate it without any permission from Mr. Petrillo, we would be breaching our contract.[305]

Unfortunately for the development of American jurisprudence, Mr. Mullen's novel principle of interpretation will not receive judicial test. The new three-year contracts between network stations and AFM Locals expressly authorize simultaneous AM-FM broadcasting with no increase in pay for musicians.[306] But the position taken by the AM broadcasters lends color to the suggestion that they have not accorded FM an unqualified welcome.[307]

Sponsors of the Lea Act did not confine their legislative efforts to matters of current controversy. They obviously had the existing AFM royalty contracts with the record and transcription manufacturers in mind when they drew the subsection providing:

> (b) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, duress, or by the use or express or implied use of other means, to coerce, compel or constrain or attempt to coerce, compel or constrain a licensee or any other person—
>
> (1) to pay or agree to pay any exaction for the privilege of, or on account of, producing, preparing, manufacturing, selling, buying, renting, operating, using, or maintaining recordings, transcriptions, or mechanical, chemical, or electrical reproductions, or any other articles, equipment, machines, or materials, used or intended to be used in broadcasting or in the production, preparation, performance, or presentation of a program or programs for broadcasting; or
>
> . . . . . .
>
> (3) to pay or agree to pay any exaction on account of the broadcasting, by means

[304] Variety, p. 32 (Sept. 3, 1947).

[305] Hearings, op. cit. supra note 91, at 302.

[306] Broadcasting 13 (Mar. 22, 1948). The ban on FM network shows has also been lifted. Letter from Everett L. Dillard, president of the Frequency Modulation Association, June 11, 1948.

[307] See cautious testimony to that effect by J. N. Bailey, executive director of the Frequency Modulation Association. Hearings, op. cit. supra note 91, at 77, 91.

> of recording or transcription, of a program previously broadcast, payment having been made, or agreed to be made, for the services actually rendered in the performance of such program.

But it is difficult to determine just what they had in mind when they made the exemption of subsection (c) for "means lawfully employed" in the enforcement of "any contract right heretofore or hereafter existing"[308] applicable to the above prohibitions. Clearly, that saved the existing royalty contracts. And seemingly it would also have saved any subsequent royalty agreements—if the Federation could secure such agreements without using force, violence, intimidation, duress, or any "other means."

Even that rather remote possibility was apparently enough to disturb the recording and transcription companies. Through the National Association of Broadcasters (which frequently displays a greater concern for the record manufacturers' problems than the interests of most of its members would warrant), they maintained the position which the WLB panel found them occupying "a little painfully" in 1942, and during the hearings which produced the Taft-Hartley Act the NAB called upon Congress for a law prohibiting the payment of royalties "to unions for their unrestricted uses."[309]

Section 302 of the Taft-Hartley Act[310] answers that call. It makes it unlawful for an employer to make any payment to a "representative of his employees," with an exception for payments into "a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents," such trust fund to be administered jointly by representatives of the employer and of the employees. This provision did not affect the distribution of funds collected under the AFM's existing royalty agreements,[311] but those agreements expired December 31, 1947. And the new law means that royalties collected by the union under any subsequent agreement cannot be used to provide employment for any musicians other than those

[308] See text following note 302 supra.

[309] Hearings before Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong. 1st Sess., at 2271 (1947). Similar requests came from the bituminous coal mine operators, objecting to the "collectivist" royalty-supported benefit plans first included in their contracts with the United Mine Workers in 1946 while the mines were being operated by the government. Ibid., at 225–29, 762–70; Hearings before Committee on Education and Labor on Bills To Amend and Repeal the National Labor Relations Act and for Other Purposes, 80th Cong. 1st Sess., at 199–203, 635, 1225, 2349–50 (1947).

[310] 61 Stat. 157 (1947), 29 U.S.C.A. § 186 (Supp., 1947).

[311] Section 302(f) provides: "This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs."

who made the records and transcriptions on which the royalties are paid—musicians who do not need such assistance. This interference with its unemployment relief plan served to aggravate the Federation's concern over a situation which, from its viewpoint, was growing steadily worse.

In the first place, the great post-war rise of the disc-jockey program has given further impetus to the use of recorded music.[312] Such leading AFM members as Tommy Dorsey and Duke Ellington have found it profitable to abandon their orchestras and become disc jockeys. Even Paul Whiteman, who had once sought to collect royalties for the broadcasting of his records, is now busily engaged in the royalty-free broadcasting of his own and other musicians' recorded performances. New York's station WNEW, devoting 15½ of its 24 hours per day to a stable of six disc jockeys, set the horrible example.[313]

And what the disc jockey is doing to the musician's opportunities in radio, the juke box is doing elsewhere. By the operator's own estimates, juke boxes now provide recorded music for more than 400,000 taverns, bars, night clubs, cabarets, etc., some of which would otherwise employ live musicians.[314] And to this form of mechanical competition must be added that of the "wired music" services, led by MUZAK of New York,[315] which pipe music from electrical transcriptions into some 750 hotels and restaurants all over the country.[316]

In view of this growth in the use of recorded and transcribed music, and while the Taft-Hartley proposals were still pending in Congress, the AFM's 1947 national convention authorized the Executive Board to initiate another recording ban.[317] Five months later, the Federation sent the following notice to all recording and transcription companies:

[312] Trade estimates in 1947 placed the number of disc jockeys at 2800. Variety, p. 41 (Sept. 3, 1947). Some indication of the number of broadcasting hours accounted for by such performers, as well as the current trend in their use, is illustrated by the situation in Chicago. In 1945 twelve disc jockeys accounted for 125 hours of broadcasting time weekly. Two years later thirty-nine disc jockeys divided a total of 268 hours. Ibid., p. 30 (July 2, 1947). In New York, ninety-three disc jockeys use 400 hours of broadcasting time per week. Ibid., p. 49 (Mar. 17, 1948).

[313] Frank, Tycoons of the Turntables, 119 Colliers 18 (Mar. 22, 1947).

[314] Hearings, op. cit. supra note 183, at 104, 110, 146. Non-industry estimates placed the total number of juke boxes at 400,000 seven years ago. Smith, What's Petrillo up To? 186 Harpers Magazine 90, 93 (1942).

[315] In addition to its wired music business, MUZAK also provided a transcription service for ABC until recently, when WOR Recording Studios took over that function. Variety, p. 69 (July 9, 1947).

[316] Smith, Is There a Case for Petrillo? 112 New Republic 76 (1945); Lunde, op. cit. supra note 282, at 50.

[317] AFM Standing Resolutions 4 (1947).

Your contract with the American Federation of Musicians for the employment of its members in the making of musical recordings will expire on December 31, 1947.

This contract will not be renewed because on and after January 1, 1948, the members of the American Federation of Musicians will no longer perform the services provided for in said contract.

This notice carries with it our declared intention, permanently and completely, to abandon that type of employment.[318]

These notices merely confirmed a declaration made four months earlier,[319] and before they were dispatched the industry had embarked on a mass scramble to build up a backlog of records and transcriptions before the end of the year. Every new composition that bore any promise of popularity was recorded. The musical selections from most of the motion pictures scheduled for 1948 release went onto matrices. Performers for transcribed musical programs worked long hours to build a stockpile of transcriptions. Plans were made to ration all new recordings. Trade rumors credited some companies with enough recordings to last two or three years, and RCA-Victor with a 25-year supply of matrices for classical records.[320]

In all this rush, the musicians gave the industry complete cooperation, even to the extent of canceling other engagements in order to devote more time to the making of matrices, and the Federation made no protest. Then, a few days before the new recording ban took effect, Petrillo gave notice of the Federation's claim that under the expiring contracts royalties must be paid to the AFM on all records pressed from matrices produced prior to December 31, 1947. Although this position finds support in the language of at least some of the contracts[321] and in the fact that royalties were not paid on records made during the period covered by the contracts from matrices cut prior to the contracts, the recorders refused to pay royalties on any records made in 1948 from matrices produced prior to the recording ban.[322] In any event, the Taft-Hartley Act quite clearly applies to any royalty payments on records made after July 1, 1948.[323]

[318] International Musician 6 (Nov. 1947).

[319] In July 1947 Petrillo told a House committee that the Federation intended to stop making records and that it might "go into the recording business itself, if we do not conflict with the anti-trust laws." Hearings, op. cit. supra note 68, at 184. Subsequently, the AFM announced that it had abandoned the idea of going into the recording business. New York Herald Tribune, p. 21 (June 9, 1948).

[320] 51 Time, No. 17, at 25–26 (Oct. 27, 1947); ibid., No. 21, at 74 (Nov. 24, 1947).

[321] The "Four Companies" agreement provides for royalty payments on "phonograph records manufactured by you or others from masters hereafter recorded by you *during the term of this agreement*." In the Decca contract, the italicized phrase is omitted.

[322] Variety, p. 33 (Aug. 18, 1948). [323] Note 311 supra.

Meanwhile, the production of matrices containing instrumental music ended with the end of 1947. Early in February 1948 the AFM agreed to allow its members to make transcriptions designed for one use only pending negotiation of new contracts with the networks, and the new contracts now provide for the continuation of that practice.[324] But with that one exception the ban was complete. During the first nine months of 1948 neither the Federation nor the companies made any attempt to seek a settlement whereby the recording ban would be lifted. Indeed it is probable that the recording companies did not want the ban ended until they had disposed of their accumulated stocks, since many of the recordings made in the closing months of 1947 would not sell in a market where the buyer had much choice. But by the end of September 1948 accumulated stocks of popular recordings were running low. While the recorders may have had a sufficient supply of classical records to last indefinitely, such records account for only 30 per cent of their total sales.[325] And the nonclassical works from which most of their revenue comes are of such fleeting popularity that a constant stream of replacements is necessary. As the companies exhausted their stocks of tunes recorded in the last few months of 1947 replacements were not forthcoming.

There had been some "bootleg" recording, of course, just as there was last time, but it again was of little consequence. The companies imported some matrices and records from other countries, but for the most part the musicians of other countries showed little talent for the type of musical interpretation which sells the most records in the United States.[326] Moreover, foreign record manufacturers may prefer to do their own exploiting of what demand there is for their product in this country—Decca, Ltd. is already distributing substantial numbers of its "London" records in the United States through the London Gramaphone Company, a subsidiary incorporated in New York in 1946.

The transcription companies were in little better position than the recorders. They could continue to manufacture singing commercials either without instrumental music or with instruments not regarded as musical

[324] Broadcasting 14 (Mar. 22, 1948).

[325] Taubman, op. cit. supra note 125, at 20; Variety, p. 46 (Mar. 19, 1947).

[326] During the first recording ban members of the English Musicians' Union refused to make records for export to the United States. During the first eight months of the current ban the English musicians not only made English records destined for United States markets, but also made records for American companies with American vocalists visiting in England and supplied American companies with recorded instrumental backgrounds for vocal recordings made in this country. In August 1948, however, the English union instructed its members not to provide any more instrumental music for American vocalists, although they continued to make English recordings for American consumption. Variety, p. 1 (Sept. 1, 1948).

by the AFM (ocarinas, ukeleles, etc.),[227] and continued production of tailor-made transcriptions seemed assured. But all library transcription production was stopped and more than one use of new open-end transcriptions made by AFM members was prevented by the recording ban. While music for such transcriptions could be dubbed in from the existing supply of recorded works, the transcription companies were in the same position as the record manufacturers with respect to new tunes.

The Federation's staying power seemed stronger than that of the companies, but not inexhaustible. The recording ban meant a reduction in the earnings of some of its members. Although those affected constituted less than 3 per cent of the total membership,[228] they were its most successful members and their superior financial (they also paid the most taxes to the union) and prestige positions made their attitude toward the recording ban of utmost importance to its successful maintenance. While they went along on the previous ban and there was no evidence that any substantial number of them were yet disposed to violate this one, it was not likely that they would be willing to give up their recording income forever. But at least until NAPA succeeded in its attempt to empower them to collect royalties on the commercial use of their records, they would probably be satisfied with a plan of settlement which took the phonograph record off the air and out of the juke box, since about 80 per cent of the demand for records comes from home users.[229]

There were new legal remedies available to the companies which had not been available during the last recording ban. The Taft-Hartley Act makes it an unfair labor practice under section 8(b)(4)[230] and the basis for a damage suit under section 303[231] for a union "to engage in . . . a strike or a concerted refusal . . . to perform any services, where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using . . . the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . ."

This provision, stemming from the notion that the secondary boycott

[227] When some of the recording companies used harmonicas to provide the accompaniment for vocal recordings of post-1947 hits, the AFM Executive Board took a new reading of the By-Laws, ignored the competing jurisdictional claims of the American Guild of Variety Artists (AFL) and announced that harmonica players were "performers on musical instruments" and therefore eligible for AFM membership. International Musician 7 (May 1948).

[228] Note 230 supra.

[229] It is estimated that 1 per cent of all record production is purchased for radio use, 19 per cent for juke boxes, and the balance for home use. Lunde, op. cit. supra note 282, at 46.

[230] 61 Stat. 140 (1947), 29 U.S.C.A. § 158(b)(4) (Supp., 1947).

[231] 61 Stat. 158 (1947), 29 U.S.C.A. § 187 (Supp., 1947).

is an evil per se, is clearly designed to outlaw strikes "an object" of which is to cause the struck employer to cease dealing with a third party, regardless of what the union is seeking to obtain from the third party. But it does contemplate that the union be seeking to affect the third party in some fashion—it does not outlaw strikes called only to secure a concession from the employer against whom the strike is called.[332] And its terms certainly do not apply to a concerted refusal to work wherein the union is not even attempting to affect the conduct of the immediate employer.

The form of the Federation's announcement of the current recording ban was undoubtedly designed with these qualifications in mind. The refusal to work for the recording and transcription companies was not conditioned on their ceasing to deal with the broadcasters and juke box operators. Nor was any other demand made on those companies.

But in his testimony before the Hartley Committee in January 1948 Petrillo suggested that Congress "make some kind of a law that the musicians can make records for home consumption, and let the musicians and the fellow who has commercialized records fight it out. . . . We favor recordings if we can stop this commercialized business on recordings."[333] On the basis of this testimony, some of the transcription companies filed unfair labor practice charges against the Federation,[334] but it was far from clear that an unfair labor practice could be proved. Petrillo's testimony articulated what was perfectly obvious anyway—that the AFM's objection was not to recorded music as such but to the use of recorded music on the radio and in the juke box. That testimony did not establish, however, that the union either demanded or expected the recording ban to compel the recording and transcription companies to cease supplying their products to the broadcasters and to the operators of juke boxes and wired music services. Obviously, the transcription companies could never be induced to take such action, since broadcasters and wired music operators were their only customers. And the Federation recognized that there apparently was no way the recording companies could prevent the broadcasters and juke box operators from buying and using their records.[335]

[332] Thus, only by a strict regard for corporate entities could it be found that a strike against RCA-Victor to compel it to cease supplying recorded music to NBC or a strike against Columbia Records to compel it to cease rendering similar service to CBS was a strike for the purpose of forcing RCA-Victor or Columbia "to cease doing business with any other person."

[333] Hearings, op cit. supra note 91, at 340, 352.

[334] New York Times, p. 17 (May 14, 1948). The original complainants were Associated Program Service, Inc., Lang-Worth Feature Programs, Inc., and Standard Radio Transcription Service, Inc., none of which manufacture phonograph records. Associated Program Service Inc., subsequently withdrew its charges. Variety, p. 45 (June 30, 1948).

[335] Thus, Petrillo told the congressional committee that "the recording companies can't say that this record is made for home consumption and that this one is made for commercial

The most that Petrillo's testimony demonstrated was that the Federation entertained some hope that by thus dramatizing the problem it might induce Congress to take action to limit the commercial use of recorded music—an objective which is hardly within the prohibition of the Taft-Hartley Act.

The Lea Act also contains a provision aimed at recording bans. Subsection (b)(2) makes it unlawful to compel or attempt to compel a broadcaster or any other person, by use or threat of the use of force, violence, intimidation, duress or any other means "to accede to or impose any restriction upon . . . production, preparation, manufacture, sale, purchase, rental, operation, use or maintenance [of recordings or transcriptions] if such restriction is for the purpose of preventing or limiting the use of such [recordings or transcriptions] in broadcasting or in the production, preparation, performance or presentation of a program or programs for broadcasting." While this statute is not limited to the secondary boycott situation,[336] insofar as it proscribes union action taken to compel the producers of records and transcriptions to "impose" restrictions upon their production, it too requires some demand upon those producers. And if the phrase "to accede to" also contemplates some sort of cooperative action on the part of the producers, application of the Lea Act would present the same problems of proof as were encountered under the Taft-Hartley Act—magnified by the burden imposed on the prosecution in a criminal case. But if "to accede to" includes mere recognition of *fait accompli*, then the recording and transcription companies had certainly been compelled to accede to a restriction upon their production.

It would still be necessary to prove, however, that the restriction was for the purpose of preventing the use of records and transcriptions in broadcasting, and there was no direct evidence of such purpose. Inferences drawn from past conduct and from Petrillo's testimony[337] might be urged

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use. They can't separate the two, because of some court decision that says that the person who buys the record has it as his property and he can do with that record as he pleases." Hearings, op. cit. supra note 91, at 352.

[336] It would, for instance, apply to the situation described in note 332 supra even though corporate entities were disregarded.

[337] Petrillo's testimony probably would not be available against him. R.S. § 859, as amended, 52 Stat. 943 (1938), 28 U.S.C.A. § 634 (Supp., 1947), provides that "No testimony given by a witness . . . before any committee . . . of either House . . . shall be used as evidence in any criminal proceeding against him in any court. . . ." Petrillo did not assert his privilege against self-incrimination at any stage of the proceedings. But United States v. Monia, 317 U.S. 424 (1942), decided under another immunity statute which did not expressly require claim of the privilege, held that such claim was not necessary. And since R.S. § 859 does not limit the immunity to testimony given under subpoena, it should likewise be immaterial that no subpoena was issued against Petrillo. 8 Wigmore, Evidence § 2282 (3d ed., 1940); cf. Sherwin v. United States, 268 U.S. 369 (1925).

to contradict the union's "declared intention," but the *WAAF* case[337a] stood as a fresh reminder that in a criminal proceeding inferences may not be enough.

Neither the Lea Act nor the Taft-Hartley Act was tested against the 1948 ban. On October 5, 1948 representatives of RCA-Victor, Columbia, Decca, Capitol, and three of the smaller record companies met with AFM officials to discuss possibilities of settlement, and on October 28 it was announced that they had agreed upon a plan formulated by attorney Milton Diamond, who had represented Decca during the previous ban but who was retained by the AFM for this one.

The "Diamond plan," which is to run for five years, provides for continuation of the royalty payments at substantially the same rates as were applied under the previous royalty contract. The payments are to be made to a trustee, who is appointed by the recording companies while the Taft-Hartley Act is in effect but who is to be appointed by the AFM as soon as the Act is repealed or "so revised as to permit such appointment." Royalty funds are to be expended by the trustee "on musical performances where no admission fee is to be charged and without any profit to the trust fund, in connection with patriotic, charitable, educational, and similar programs." For this purpose the trustee is to distribute the funds among the AFM Locals on a per capita basis and to supervise the manner in which they are expended by the Locals. As a part of the agreement the AFM waived its claim to royalties on records pressed between January 1, 1948 and October 1, 1948 from matrices made under the old royalty contracts.[337b]

This agreement did not become effective immediately—its operation was conditioned upon assurance from the Department of Justice that it did not violate the prohibition of payments "to any representative of . . . employees" contained in Section 302 of the Taft-Hartley Act. But on December 13 the Department, departing from its usual practice, issued an opinion advising the parties that the trustee was not a "representative of employees" within the meaning of the Act, and AFM members began recording for signatories to the agreement the following day.[337c] The smaller recording and transcription companies will have no choice but to join in this agreement.

Thus have the companies secured peace by joining in a plan to avoid

[337a] See Countryman, The Organized Musicians: I, 16 Univ. Chi. L. Rev. 56, 82–84 (1948).

[337b] Variety, p. 37 (Nov. 3, 1948); Broadcasting, p. 21 (Nov. 1, 1948); New York Times, p. 1 (Dec. 14, 1948). The companies have designated Samuel Rosenbaum, a director of the Philadelphia Orchestra Association, as first trustee under the plan.

[337c] New York Times, p. 1 (Dec. 14, 1948).

the statutory prohibition which they had beseeched Congress to enact a year earlier. And peace seems assured for five years—the AFM's record for performance of its contracts is perfect. But it seems unlikely that the royalty system constitutes a lasting solution to the problem. The limited amount of employment which it provides falls far short of balancing the unemployment which the Federation attributes to the use of recorded music. The union may yet be driven by the force of its own arguments to the position that it will no longer provide recorded music for commercial use, and if the union takes that position the companies will doubtless make new demands for effective legal sanctions. The difficulties inherent in the application of the Lea Act and the Taft-Hartley Act indicate that legal sanctions, to be effective, may have to be made applicable to union activity without the necessity of proving a specific purpose.

But any attempt to fashion a statute which would forbid the recording ban regardless of its purpose would present an even more serious problem under the Thirteenth Amendment than the one avoided in the *WAAF* case. Although the question is still open,[338] that Amendment is not drawn in terms which indicate that it imposes no limitation upon federal power. It provides that involuntary servitude shall not exist "within the United States, or any place subject to their jurisdiction." Nor does the further provision giving Congress power "to enforce this article by appropriate legislation" suggest that Congress is to be left free also to adopt legislation of opposite effect. True, even though a right to strike should be found in this constitutional prohibition, it would not be unlikely that such right would be held subject to some legislative restriction based upon the purposes for which the strike was called,[339] and the provision of the Lea Act involved the *WAAF* case might be sustained on that ground. But if the Thirteenth Amendment is to have any operation other than as an enabling ordinance for federation legislation prohibiting involuntary servitude created by state or individual action,[340] it must invalidate a federal statute which would forbid an individual to quit his job. And if it limits the federal power to that extent, it can be reconciled with a federal statute proscribing a concerted, unqualified refusal to work only by exhuming the

[338] See The Reach of the Thirteenth Amendment, 47 Col. L. Rev. 299 (1947); The Lea Act: An Enactment To Proscribe Certain Coercive Practices Affecting Broadcasting, 35 Geo. L. J. 79, 86–91 (1946).

[339] It has been decided that a state does not violate the Fourteenth Amendment by imposing criminal penalties upon a labor-union official who called a strike to enforce a stale wage claim of a former employee of the struck employer. "Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike." Dorchy v. Kansas, 272 U.S. 306 (1926).

[340] See Pollock v. Williams, 322 U.S. 4 (1944), and cases cited; Federal Power To Prosecute Violence against Minority Groups, 57 Yale L. J. 855, 864 (1948).

legal abracadabra of civil and criminal "conspiracy" in labor cases from a deserved repose.

Moreover, it is not at all clear that the interest of the public (i.e., those of us who are not professional musicians and who have no financial interest in broadcasting, recording, juke box, and wired music businesses) requires governmental action of this sort. True, it would benefit the companies involved if the government were to end recording bans by compelling the musicians to return to their recording work. But recording bans could also be ended, in a manner beneficial to the musicians rather than to their opponents, if governmental power was exercised to compel the broadcasters and the juke box and wired music operators either to cease using recorded music or to use it only on terms agreeable to the musicians. As the record now stands, it has not been demonstrated that the public has more reason to have its government intervene on behalf of the industries than on behalf of the musicians.

Disregarding charges and countercharges pitched at the emotional level, the arguments which each side has presented to the various governmental forums in which the problem has been aired have centered around two main issues:

1) The Federation has offered but one justification for its recording bans—the employment needs of the musicians. In support of that argument, it offers estimates that not more than one-third of its 200,000 members are able to find full-time employment in the musical field. The companies, somewhat obliquely, treat these same estimates as evidence that the Federation faces no unemployment problem. They refuse to accept the total membership figure as any evidence of employment needs. They take the somewhat novel (for an employer) position that the Federation is too free with its memberships. Pointing to the low admission requirements, initiation fees, and dues, and to the fact that a member who finds little musical employment pays little to maintain his membership, they suggest that most of the AFM members are enrolled solely for the purpose of sharing in the royalties from the recording contracts and in such other benefits as the Locals may provide. They offer the results of certain spot-checks which they have made in a few cities which show that only about one-third of the union members in those cities classified themselves, either in city directories or in response to direct inquiry, as musicians, and that the remainder classified themselves in other vocations.[34a] The final thrust

[34a] These figures, if otherwise reliable, reveal only the number of union members who are still primarily employed as musicians or who are still seeking such employment, and hence afford no more basis for evaluating the AFM's claims than do the figures of the federal census reported in note 123 supra.

of their argument is that the 135,000 AFM members not engaged as full-time musicians are not competent musicians anyway.

This position is as untenable as the Federation's contention that every member not working full-time at music is an unemployed musician for whom musical work must be found. The true situation lies somewhere between the claims of the disputants. There are undoubtedly a substantial number of AFM members who are not capable of filling first-rate professional engagements: oldtimers who are no longer able to perform but who have an interest in Local benefit plans, and others of limited attainments who can expect no more than an occasional local engagement. But it cannot be assumed that all of those members who now find regular but less than full-time musical employment are not competent musicians. Nor does it seem feasible to require a survey to determine the competence of each AFM member. It will be time enough for the companies to assert that all competent musicians are already employed when they can produce evidence that the Federation is offering unqualified men to fill musical engagements.

Certainly, on the basis of presently available information we are not ready to conclude that all those who now seek unsuccessfully to make a living as musicians should be forced to transfer their efforts to some other vocation. Nor should we overlook the fact that some measure of opportunity must be maintained if new talent is to be encouraged to enter the field, and that a period of apprenticeship is necessary to segregate those new entrants who have talent from those who have not. There is no evidence that the demand for employable musicians has now reached the point where the only available supply is the untalented by-product of that segregative process.

2) The companies contend that the Federation's resistance to mechanical competition is but one more instance of a labor union's selfish efforts to deprive society of the benefits of technological progress. Such a contention is unassailable so long as "technological change" and "technological progress" are assumed to be identical, but such an assumption will not always bear analysis. Presumably, "progress" is embodied in technological development if that development provides a better product than was previously available or provides the same product at a lower price. To test the phonograph record and the transcription by that standard, it is necessary to examine them in the context of the commercial practices which the AFM opposes.

Does the phonograph record, in those instances where it has replaced the live musician, supply a better musical product? It is true that by using

phonograph records a radio station can in many instances bring to its listeners the performances of better musicians than it can employ. But does it follow that a program where such performances are used only to provide an occasional three-minute interval in the vacuous monologue of a disc jockey is preferable to a live program featuring less accomplished musical performers? The answer to that question is not to be found by consulting a poll which indicates that listeners may consider such a program preferable to the soap opera or the audience-participation show.[342] And even those who would come to the defense of the disc jockey are not likely to argue seriously that the strident blasting of the juke box is superior to the performance of even the most modestly endowed live musician.

Does the phonograph record provide a cheaper source of musical entertainment? Without question, the operator of the radio station can provide a recorded musical program at substantially less cost than he can employ a live orchestra. But do the listeners benefit by this saving? Clearly they do not benefit as listeners—the cost of radio programs is not reflected in the cost of receiving sets. If that benefit is to reach them at all, it must be in their capacity as consumers of the sponsor's product and must pursue a devious route through reductions in the cost of the program to the sponsor and corresponding reductions in the cost of his product. No such elaborate theory of derivative benefits is urged by the companies in support of their "technological progress" argument, and the only available bit of evidence indicates that economies effected in the production of radio programs are at least to a large extent absorbed at the source—during the eight-year period from 1938 to 1945 the broadcasting industry increased its ratio of net income to gross revenue from 17 per cent to 28 per cent.[343]

Of course, the benefit may reach the listener in another form. The availability of cheap recorded music permits the operation of small stations in some localities where the cost of live performers would prove prohibitive. To the extent that such stations provide their communities with local service not available to them otherwise, the local benefit may be attributed to savings effected through the use of mechanical music. But the broadcasters have been understandably reluctant to call attention to the local service offered by such stations. When the FCC examined the programs of 376 stations of 250 watts or less in 1945, it found that they devoted an average of two hours and forty-three minutes per day to "local live" pro-

[342] Local disc jockeys are reported to have higher local Hooper ratings than competing network shows. Variety, p. 92 (Jan. 7, 1948). But no recorded show is included in the Hooper listing of the top fifteen programs. Variety, p. 21 (Nov. 3, 1948).

[343] FCC Blue Book 48; FCC, Thirteenth Annual Report 18 (1947). Gross revenues during the same period increased 168 per cent.

grams (including, in many cases, the performances of local disc jockeys and of local announcers reading syndicated "wire" news), and that only forty-four minutes of this time was during the best listening hours (6 to 11 P.M.) of the day.[344]

Outside of the field of radio broadcasting, any traces of saving to the purchasers of musical entertainment are even more difficult to detect. Savings to the tavern keeper or night club operator who has replaced his orchestra with the juke box are apparent—what was previously an investment in customer-attraction whose value was highly speculative has now become a separate source of revenue.[345] But the customers who now pay out an estimated $230,000,000 in nickels annually[346] to keep the juke boxes operating can hardly count occasional instances of elimination of cover charges or reduction in the cost of food and beverage as a clear gain.

A better case for "technological progress" can be made out for the electrical transcription—if we eliminate the spot commercial, which could be defended by none but its manufacturer and user.[347] As recently listed by the FCC,[348] the chief advantages of transcriptions which are relevant to musical programs are:

1. They "make possible the compilation of a permanent archive of the best in radio."
2. They facilitate the placing of programs at convenient hours, despite differences in time zones.[349]

[344] FCC Blue Book 38.

[345] Under current trade practice the proprietor of the amusement place gives nothing but his permission to have the juke box installed, for which he receives 50 per cent of the revenue, although there is a move on among the owners of the machines to reduce his share to 25 per cent. Hearings, op. cit. supra note 183, at 175–76.

[346] Schumach, A Juke Box for Every 500 Persons, New York Times Magazine 31 (Apr. 14, 1946); Hearings, op. cit. supra note 183, at 18. The juke box industry disputes this estimate, but professes complete inability to supply a more accurate one. Ibid., at 98, 108, 140–41.

[347] A poll recently conducted for the National Association of Broadcasters by the University of Chicago's National Opinion Research Center reveals that when forced to choose between "singing commercials" and "straight commercials," 43 per cent of those polled chose the straight commercials, 37 per cent chose the singing variety, 18 per cent had no preference, and 2 per cent were undecided. Unfortunately, the poll did not seek a separate reaction to straight commercials against which these comparative figures might be measured, although it did establish that only 20 per cent of those polled would be willing to pay a license fee of $5 per year to "get your present radio programs without any advertising in them." National Opinion Research Center, Final Tabulations: 3529 Interviews of Second Study of Public Opinion Conducted for the National Association of Broadcasters 5–6 (1948). A similar poll conducted by the same Research Center in 1945 revealed that when asked to cite an example of "the worst advertising you've heard on the radio," 11 per cent cited a singing or rhyming commercial. The same stout 20 per cent was willing to pay a $5 fee to get radio programs without advertising. Lazarsfeld and Field, The People Look at Radio 111–12 (1946).

[348] FCC Blue Book 36.

[349] The FCC noted, however, that "some stations appear to use the transcription technique for shifting an outstanding network public service program from a good hour to an off hour when listeners are few and commercial programs are not available."

3. They make possible the sharing of programs among stations not affiliated with a network.
4. They provide an opportunity to edit the performance before it is released over the air.[350]

In each of these respects the electrical transcription is a factor contributing to a better radio product, and one which the listening public has a definite interest in retaining. But as long as a recording ban is not applied to transcriptions limited to one use per station it deprives the listener only of the first, and most dubious, of these advantages.

On such information as is now available, then, it appears that, apart from some inconvenience to the private collector of popular records, which is hardly a matter of national concern, recording bans cause hardship to none but the recording companies, the broadcasters, and the juke box operators, and that there is no apparent reason why the government should intervene on their behalf rather than on behalf of the musicians. Indeed, the musicians' economic interest in restricting the commercial use of phonograph records seems to a large extent to coincide with the public interest in better musical entertainment, so that if the government is to intervene at all, that intervention might more properly be in a form which would aid the musicians.

But governmental action to further the public interest in better musical entertainment hardly seems likely in the immediate future. Although the FCC's recent "Blue Book" pronouncement[351] has been both hailed and denounced as the opening wedge in a scheme of widespread governmental supervision of radio program content, the policy which it announces is aimed only at securing a reasonable allocation of broadcasting time to sustaining programs, local programs, and discussions of public issues, and at eliminating advertising excesses. Extensive use of recorded music is denounced only to the extent that it conflicts with that policy. And while attempts of the Commission to enforce its Blue Book policy may lead eventually to decisions indicating that it has authority under the Communications Act of 1934 to go even further to require the broadcasters to serve "public interest, convenience and necessity,"[352] there are no in-

[350] An even better opportunity for editing is presented by the tape recording, now used by ABC in the preparation of the Bing Crosby program and by NBC and CBS for their daylight saving time delayed broadcasts. Variety, p. 1 (Oct. 1, 1947); ibid., p. 40 (Mar. 24, 1948); Newsweek 31 (May 3, 1948).

[351] Note 245 supra.

[352] The only decision yet rendered in review of FCC action under the Blue Book policy holds no more than that the Commission could find that public interest, convenience, and necessity would not be served by granting an application for power increase and frequency change filed by a licensee who planned to plug into the CBS network from 8 A.M. to 11 P.M.

dications that either the Commission or the Congress is yet approaching the point Secretary Hoover had reached in 1922.

As long, then, as we are content to leave program standards to the dictates of the market place, we should count as a fortuitous benefit the demands of a labor union which may serve to improve those standards.

It is not likely, however, that any such view of recording bans will prevail. The broadcasting and recording companies have a different view to present, and they may doubtless count on the same full cooperation from most of the newspapers as they have received in the past. Labor unions are always fair game for the press, which can make a national issue of a strike by New York City elevator operators but can find no occasion for comment in the refusal of industry to do anything about defense production on the eve of world war until commitments are obtained on terms of payment, profits, taxes, etc. Nor is it irrelevant, in the context of the recording controversy, that one-third of the broadcasting industry is owned by newspaper interests[353] and that newspapers and broadcasters depend on the same advertisers for their revenue.

The pattern of this cooperative effort during the first recording ban offers a reliable indication of what may be expected. Before the ban took effect, the National Association of Broadcasters had set up a public relations office in New York, had "brought the facts in this matter to the attention of the newspapers and of other interested groups," had contacted the advertisers and learned that "they are prepared to stand loyally with the broadcasting industry," and was able to announce that the initial reaction to its public relations campaign was "favorable" and that "a large number of newspaper editorials on the matter have been printed uniformly denouncing Mr. Petrillo's course of action."[354] In succeeding weeks it was able to point with pride to an "unprecedented" number of such editorials in newspapers throughout the country, from the *New York Times* to the *Wyoming Eagle*, all of which denounced the AFM, and few of which discussed the matter in anything but the inflammable invective of "dictatorship." After a month of this emotional haranguing, a resolution was introduced in the Senate to authorize the first congressional investigation of the AFM,[355] and Dr. Gallup reported that public reac-

every day, saving only the hours from 5 A.M. to 8 A.M. for local programs. Simmons v. FCC, 169 F. 2d 670 (App. D.C., 1948).

[353] Newspapers hold more than one-third of all AM licenses, constitute more than one-third of all newcomers to FM, and are the largest single group of applicants for television licenses. Variety, p. 1 (Jan. 29, 1947).

[354] NAB, Special A.F. of M. Bulletin 1 (July 24, 1942).

[355] See note 173 supra.

tion to "Mr. Petrillo's ruling" was 75 per cent unfavorable and that 73 per cent of those polled approved of "the government taking legal action to stop Petrillo."[355]

When editorial fury began to subside, the NAB provided new impetus and new ammunition in the form of a pamphlet entitled "The C Is For Caesar" which rang the changes on the "technological progress" theme and pictured the plight of the small broadcasting station attempting to present a performance of the "Unfinished Symphony" with "two or three or even six local musicians of uncertain attainment."[357] When some of the companies withdrew from the controversy and signed royalty contracts, the NAB found solace in editorial condolences and drew strength from editorial tributes to those with the courage to continue the fight against tyranny.[358] When the AFM refused to comply with the WLB order and the President's request, newspaper comment reached a final despairing crescendo, decrying government's abdication to "irresponsible private dictatorship."[359]

The earlier ending of the second recording ban foreclosed resort to the same tactics this time, but all preparatory steps had been taken. A Special Industry Music Committee, consisting of representatives of the National Association of Broadcasters, the Frequency Modulation Association, the Television Broadcasters Association, the transcription companies, and the record manufacturers, was created in October 1947,[360] and the Committee retained public relations counsel.[361] Another congressional investigation of the AFM was conducted by the Hartley Committee in January 1948.[362] Some delay in the publicity campaign was neces-

[355] NAB, Special A.F. of M. Bulletin 5 (Sept. 4, 1942).

[357] Ibid., No. 9 (Oct. 2, 1942). [358] Ibid., No. 23 (Oct. 29, 1942).

[359] Ibid., No. 29 (Nov. 24, 1944). In its entire three-year history, the War Labor Board's orders were disregarded 27 times by unions and 24 times by employers. 17 Lab. Rel. Rep. 605 (1946). But the amount of publicity given the AFM case was rivaled in only one other instance, wherein publicity of a different sort resulted in a congressional investigation of the government's power to take over a business for noncompliance with WLB orders. Hearings before Select Committee To Investigate Seizure of Montgomery Ward & Co. pursuant to H. Res. 521, 78th Cong. 2d Sess. (1944).

[360] NAB Reports 880 (Oct. 29, 1947). [361] Variety, p. 21 (Dec. 31, 1947).

[362] Hearings, op. cit. supra note 91. At these hearings industry spokesmen suggested additional legislation to outlaw nation-wide collective bargaining and to subject union activity to the anti-trust laws. Ibid., at 58, 228, 235. Shortly thereafter Representative Hartley obligingly introduced H.R. 6074, 80th Cong. 2d Sess. (1948), which would have made the Norris-LaGuardia and Clayton Acts inapplicable to "any strike or other concerted interference with the operations of two or more employers which results from any conspiracy, collusion or concerted plan of acting between employees of such two or more employers" or wherever labor unions engage in "any combination or conspiracy, in restraint of commerce, if one of the purposes or a necessary effect . . . is to join or combine with any person to . . . restrict pro-

sary because negotiations on new network contracts were pending when the recording ban went into effect[363] and because of the recording companies' interest in avoiding any termination of the ban until existing record stocks were sold.[364] But if the ban had not ended before those stocks were exhausted, the press would undoubtedly have again discovered large moral issues in the controversy.[365]

CONCLUSION

In any evaluation of the American Federation of Musicians, the "dictatorship" issue may be put to one side. In its internal operations the Federation is no less democratic than most other organizations of comparable size. True, its members, like the members of most labor unions and the stockholders of most large corporations, are disposed to perpetuate the same men in office[366] and to leave the making of most policy decisions to the discretion of the officers. But, save for the attempt to disfranchise the members of New York Local 802, which failed twelve years ago, there is no evidence of irresponsibility on the part of AFM officers. As the employer member of the WLB panel said in 1944, "Mr. James C. Petrillo, while certainly in charge of his union, is certainly no more so than the head of every well-run corporation is of his company."[367]

Actually, when the employers raise the "dictatorship" charge, they do not attempt to support it by evidence of the manner in which the union is governed, save for an occasional reference to the provision in the AFM By-Laws authorizing the President to set aside existing laws and sub-

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duction, distribution, or competition, or impose restrictions or conditions upon the purchase, sale, or use of any product, material, machines, or equipment. . . ."

[363] Final agreement between the AFM and the networks on a pay scale for television was reached on April 29, 1948. On the same day the Special Industry Music Committee announced that it had retained a new public relations counsel, who is reported as having explained that "a major part of his job will be to get across to the public the fact that the AFM's recent settlement of radio and television contracts has not entirely ended the Petrillo problem." Broadcasting 30 (May 3, 1948).

[364] The latter consideration was apparently overlooked by baffled Congressmen who sought in vain for some explanation from the recording companies for their failure to invoke the anti-boycott provisions of the Taft-Hartley Act last January. Hearings, op. cit. supra note 91, at 102–3, 202–3.

[365] The AFM, which has had no faith in publicity as a weapon since the failure of its campaign against sound movies, had apparently decided to give it another try. It had employed public relations counsel, and its version of the recording ban was sent to schools, libraries, and newspapers throughout the country. Variety, p. 45 (May 19, 1948).

[366] Leadership of the AFM during its fifty-two-year history has been divided between three men. Owen Miller, president of the St. Louis Local, served also as the first president of the AFM. He was replaced in 1900 by Joseph N. Weber who, save for a one-year retirement because of illness in 1914–15 when his place was taken by Frank Carothers, served until succeeded by Petrillo in 1940.

[367] Electrical Transcription Manufacturers, 16 War Lab. Rep. 369, 396 (1944).

stitute others of his own making. Instead, they point to the fact that Petrillo habitually serves the union's demands in the form of peremptory decrees which leave the employers no alternative but to acquiesce,[368] seeking to leave the impression that they have nearly always, under duress to be sure, acquiesced. But the record of past bargaining history hardly supports that position.[369] It suggests, rather, that in those cases where AFM leaders have been most arbitrary in their dealings with the companies, as in the instances of the bans on co-op, FM, and television broadcasting, their action stems from their complete inability to determine what sort of demands to make, and that this inability has ultimately operated to the advantage of the companies.[370]

Aside from the fact that its practice of calling musicians out of the studios without having formulated any policy to be served thereby has resulted only in depriving AFM members of years of employment in television and FM broadcasting and on co-op shows, the most serious complaint which can be made against the Federation leadership goes to the extremely myopic nature of some of the policies it has adopted. The most indefensible of its practices are those which have brought the least benefit to the membership. The complete elimination of all public performances by amateur musicians throughout the United States would probably not create enough additional work for professionals to support fifty AFM members—but to the pursuit of this trivial objective must be credited, in large part, the congressional indignation which found expression in the Lea Act. And though the union's quota rules and standby practices may have provided immediate relief for a greater number of musicians, such

[368] The form of the demand for standbys on duplicate AM–FM broadcasts is typical: "This is to advise you that after meeting between your company and the AFM held in my office, the matter was further discussed and we came to the final conclusion that beginning Monday, October 29, 1945, wherever musicians play for FM broadcasting and AM broadcasting simultaneously, . . . a double crew must be employed. Kindly govern yourself accordingly." Hearings, op. cit. supra note 91, at 68.

[369] Nor does the testimony of NAB President Justin Miller:

"MR. MILLER: . . . As I say, the trouble is the dramatic, the ultimatum technique . . . which he [Petrillo] prefers to use. Frankly, I think it is because it impresses his own large spread membership.

"MR. MCCONNEL: In the past, have you usually given in to Mr. Petrillo?

"MR. MILLER: I should say it has been a matter of bargaining. There has been a compromise. There has always been some giving in, yes. You can see that from the rate of wages, I imagine.

"There probably has been too much giving in. Is that what you want me to say? I will be glad to say it. Personally, I think there has been too much giving in." Hearings, op. cit. supra note 91, at 18.

[370] Other unions in the broadcasting industry were outraged at the AFM's 1948 "Munich agreements" with the networks, wherein the Federation capitulated to all employer demands without getting anything in return. Variety, p. 27 (Mar. 24, 1948).

devices offer no lasting solution to unemployment. As private systems of social security, their method of distributing the cost is much too haphazard and unreliable to warrant approval. They have already contributed much to the enactment of restrictive labor legislation, and if that legislation proves inadequate to end those practices it is quite probable that Congress will try again.

On the matter which has provoked the most criticism and the greatest amount of adverse governmental activity, however, the Federation's position is quite defensible. The machine constitutes a real and growing threat to the future of the musical profession. Yet, while the future of that profession should be a matter of public concern, the only steps currently being taken in its behalf are those taken by the musicians themselves[371] within the restricted area left open to them under existing legislation. True, the AFM's method of dealing with the problem may not be the best method which could be devised. The public interest in radio service and in musical entertainment might be better served if the musicians were required to make library and open-end transcriptions and to keep smaller radio stations and home phonographs supplied with records of the latest tunes.

But, aside from the improbability of government intervention being limited to that extent, the case presents another factor in which the public has some interest. Although it is not yet clear as a matter of established legal doctrine, the personal liberties which are supposed to constitute an essential ingredient of our society should include freedom from compulsory service. And though those liberties may be subject to some abridgment when their exercise threatens the existence of that society, nothing like a "clear and present danger" to its existence is presented by the musicians' refusal to serve the recording companies. If future recording controversies prompt governmental action which fails to recognize that fact, the broadcasting and recording industries may count as well spent their investment in "public relations."

[371] The musicians and other artists have had occasional champions in Congress. Florida's Senator Fletcher kept bills to create a "National Conservatory of Music and Art" in the hopper for six years. S. 4874, 65th Cong. 2d Sess. (1918); S. 561, 66th Cong. 1st Sess. (1919); S. 622, 67th Cong. 1st Sess. (1921); S. 808 and S. 1320, 68th Cong. 1st Sess. (1924). Representative Connery of Massachusetts once introduced a bill to create a "Commission for the Advancement of Music and Art." H.R. 7161, 74th Cong. 1st Sess. (1935). And New York's Representative Sirovich for five years sponsored measures to create a cabinet "Department of Science, Art and Literature" or a "Bureau of Fine Arts" in the Department of Interior. H.J. Res. 200, 74th Cong. 1st Sess. (1935); H.J. Res. 79, 75th Cong. 1st Sess. (1937); H.J. Res. 671, 75th Cong. 3d Sess. (1938); H.J. Res. 149, 76th Cong. 1st Sess. (1939).

THE LOYALTY ORDER'S CHALLENGE TO THE CONSTITUTION

CLIFFORD J. DURR*

IN HIS "Memorial and Remonstrance" to the Virginia assembly, issued in 1785, James Madison warned that "it is proper to take alarm at the first experiment on our liberties."[1] If his warning is to be taken seriously, there is occasion for grave alarm in the President's Loyalty Order issued March 21, 1947[2] and in the regulations and directives of the Loyalty Review Board issued pursuant thereto. True, this is not the first "experiment on our liberties" since Madison wrote, but I doubt that there has been any more dangerous in its implications and potentialities.[3]

I am convinced that the evils of the Order far outweigh any possible good that can come from it. It has within it such potentialities of injustice, oppression, and cruelty that its administration will inevitably result in the alienation rather than the promotion of the loyalty of government employees.

While the "standards" list among the tests of loyalty offenses such as espionage, sabotage, treason, etc. (which are already covered by our criminal laws and with which our courts are fully competent to deal), the basic concern of the Order is with attitudes and associations rather than with wrongful behavior—with ideas rather than with deeds. The ultimate determination to be made under the Order is not whether an employee has committed illegal or harmful acts, but whether "reasonable grounds" exist for believing that he is "disloyal."

* Member of the Alabama and Wisconsin Bars; member of the Federal Communications Commission, 1941–48.

[1] 2 Writings of James Madison 185 (Hunt ed., 1901).

[2] Executive Order No. 9835, 12 Fed. Reg. 1935 (1947).

[3] Other authors have also expressed considerable misgivings. See O'Brian, Loyalty Tests and Guild by Association, 61 Harv. L. Rev. 592 (1948); Pike, Witch Hunting Then and Now, 180 Atl. Monthly 93 (Nov. 1947); Cushman, The President's Loyalty Purge, 36 Survey Graphic 283 (May 1947); Schlesinger, What Is Loyalty?—A Difficult Question, New York Times Magazine, p. 7 (Nov. 2, 1947). The operation of a loyalty check by the Atomic Energy Commission pursuant to the Atomic Energy Act has also provoked widespread protest. See Miller & Brown, Loyalty Clearance Procedures of the A.E.C.—A Report and Recommendations, 4 Bulletin of the Atomic Scientists 44 (Feb. 1948); Loyalty Clearance Procedures in Research Laboratories, 4 Bulletin of the Atomic Scientists 111 (Apr. 1948).

Loyalty is a condition of the mind and emotions and, in my opinion, is too subtle a matter to be measured by any such standards as those laid down in the Order, or any which are likely to be laid down under it. I do not believe that men should be officially empowered to sit in judgment on the minds and emotions, or even the associations,[4] of other men and to judge them by tests short of overt acts or expressions tantamount to overt acts. Lacking any such objective tests, the guide followed will inevitably be the personal opinions and tastes of the judges. Any attempt to punish men for their state of mind or to force their mental processes and conclusions by intimidation rather than to persuade them by reason is as futile as it is wrong. The government may punish or reward acts, it may command obedience; but loyalty, it seems to me, has to be earned.

Faithless as well as incompetent employees should, of course, be removed from their jobs, but the best test of competence and faithfulness, it seems to me, is performance on the job. The Executive Order rejects this test. Instead it sets up a set of subjective standards by which *future* behavior on the job is to be anticipated. "Reasonable grounds" for "belief" that future performance may be bad, arrived at by the application of these subjective standards, cannot be overcome by a long record of good performance in the past. The verdict turns only on reasonable grounds for "belief" and not upon the preponderance of the evidence. To save his reputation and his job the employee must eradicate all "reasonable grounds" for unfavorable belief even though he may not know, with certainty, what the grounds are. Men are to be known not by the fruits which they have borne, but by prognostications as to the fruits they may bear.

Even if men were given the wisdom always to know with certainty what ideas are good or bad, I doubt the efficacy of intimidation or oppression as a means of stamping out the bad. The expression of ideas may be temporarily silenced, but repression will not destroy them. The only effective weapon against bad ideas is good ideas plus the demonstration of good ideas in action.

The leisurely pace of the administration of the Order, as well as its express provisions, emphasizes its concern with attitudes rather than actions and its futility as a measure of national security. Real dangers call for prompt action. But the Order was issued March 21, 1947. It was not until December 17, 1947, nine months later, that the Loyalty Review Board

[4] For recent judicial pronouncements condemning imputation of guilt on the basis of association, see Bridges v. Wixon, 326 U.S. 135 (1945); Schneiderman v. United States, 320 U.S. 118 (1943).

issued its first regulations and directives to the government departments and agencies. And in the summer of 1948, more than a year later, some of the federal agencies wese still giving consideration to the adoption of rules under which their part of the program is to be carried out. The provisions for notice and appeal may serve the ends of fairness, but they are hardly consistent with a reasonable belief in the existence of any "clear and present danger." Moreover, unless it can be assumed that "clearly favorable" findings can be made on all except an inconsequential number of employees, the hearing procedures, even as to employees now on the payroll, will require months for completion. They may require years.

If there are, in fact, "dangerous possibilities involved," as contended by the Chairman of the Loyalty Review Board, then the whole loyalty program had better be scrapped immediately and less cumbersome procedures adopted forthwith to deal with the situation. We cannot afford to temporize when our government is in danger. However, the Federal Communications Commission, for example, operated for more than a year without any loyalty program whatsoever, and I believe its experience is typical of that of many other agencies. So far as I am aware, those in charge of the program did not seek to impress the Commission with the urgency of immediate action. This would seem to indicate that the concern over the "dangerous possibilities," which are cited in justification of the program, is not so great as suggested.

I am convinced that the end result of the Executive Order will be to endanger national security rather than to safeguard it. At a time when confidence in government is of vital importance, the Order tends to destroy confidence by creating fears that the government cannot be trusted because of enemies within its own ranks. By its very provisions the Order officially expresses a lack of confidence in the vigor and effectiveness of those "democratic processes" which it declares to be "the heart and sinew of the United States." It impairs rather than promotes loyalty by departing from those principles of freedom of belief and association and of fair play which, in a democratic society are, and should be, the basis on which loyalty is founded.

It impairs the morale, and therefore the efficiency, of government employees by exposing their reputations and jobs to continuous attack by nameless accusers. It discourages, and in many instances bars, the entry into government service of men of ability, integrity, experience, and imagination, because of their inability to answer unspecific charges of unidentified informers or their unwillingness to subject their reputation

to the hazards which are now made a part of government service.[5] It deprives the heads of government agencies and departments of effective control over their own personnel and places in the hands of the Federal Bureau of Investigation a dictatorial power over government employment policies.

It tends to force all political, economic, and social thinking into orthodox patterns at a time when new and unorthodox ideas are desperately needed to cope with new and unorthodox problems. It creates an atmosphere hostile to reason, an atmosphere in which we may be dangerously misled into rejecting information of vital importance solely because it appears to conflict with accepted beliefs of what is so.

The order applies with equal force to all departments and agencies of government, regardless of their functions and responsibilities, and to all employees, regardless of the nature of their work. The typist in the Children's Bureau of the Department of Labor must meet the same test as an employee handling confidential documents in a highly "sensitive" position.

No reasonable person would suggest that the proper way to stamp out robbery in this country is to make suspects of 140,000,000 American people and examine them all for their criminal tendencies. Reason demands concentration on the immediate sources of danger. The absorption of the police in the major task would enable the real robbers to continue their robbing without great fear of molestation. Yet the Executive Order proposes just such a course with respect to government employees. Two million of them are made "suspects" and must be examined for their "disloyal" tendencies.

If we believe that national security is, in fact, so seriously endangered as to warrant the drastic measures proposed in the Order, can we then afford to stop our crusade for loyalty with government itself? War is no longer the exclusive affair of professional armies or even of the government. Our national security hinges to as great, if not to even greater, an extent upon our mines, factories, mills, and transportation and communications systems. If the "disloyal" clerk in the Fish and Wildlife Service of the Department of the Interior is a threat to security, then is not the "disloyal" worker in a steel mill or automobile factory a far greater threat?

What is to become of the "disloyal" government employee who is dis-

[5] It is, for example, well known that many scientists have refused to accept work on government sponsored classified projects because of the loyalty checks. See 4 Bulletin of the Atomic Scientists 218 (July 1948).

charged? Is he to be turned loose as a menace to society, to find his way, under an assumed name perhaps, to a job in an airplane plant or an oil refinery? Logic forbids such a course.

If, again, security requires the suppression of dangerous ideas, what about our broadcast stations and networks, with their continuous access to the ears and minds of the American people? What about our newspapers, with their tremendous power of molding public opinion? One of our largest newspapers has been charged with publishing military secrets in time of war, but it is still being published. Can we assume that "disloyal" people have not infiltrated into their ranks? Where can we draw a line consistent with safety?

Even though the principles of the Executive Order are not officially extended beyond government, the example of government will inevitably be followed outside of government. The brand of "disloyalty" will not fade into invisibility once the employee has passed into private life. Moreover, private branding irons are already being made after the government's pattern and more will be made. Can anyone be sure that he will never feel their burn?

We are on the way to creating a new class of outcasts from society—a caste of economic and social "untouchables." This new caste will certainly threaten our security. It will also challenge our humanity. Barred from the normal occupations by which people earn their living, its members will be faced with the alternatives of hunger, an uncertain charity, or crime. Denied the companionship of the clearly "loyal," they will be driven by sheer loneliness into the society of the affirmatively disloyal. If hunger does not make them dangerous, resentment will.

The Executive Order treats rumor and gossip as evidence and shelters it from the test of examination. In the name of security, it raises talebearers and informers to a new level of human dignity, while denying their victims the procedural safeguards guaranteed by our Constitution to the most vicious criminals—including spies, saboteurs, and traitors. By sparing talebearers from the uncomfortable experience of meeting their victims face to face and sheltering them from that public scorn and contempt which has been their traditional lot, it has deprived us of our most effective defense against their mischief. It defies basic religious teachings by giving protection and power to a group against which we are repeatedly warned in both the Old and New Testaments.

By giving official acceptance to rumor and protection to informers, it places in the hand of our enemies effective weapons of psychological warfare to be used against us. The role of "confidential informer" is a

most convenient one for the enemy agent having the assignment of creating fear, distrust, and suspicion and undermining morale.

It purports to serve our "democratic processes" by ignoring the principle that men should be deemed innocent until their guilt is proved; by denying the right of public trial before an impartial tribunal; by withholding from those accused full information as to the nature and cause of the accusations; by denying to those accused the right to be confronted by their accusers; by failing to extend to them the benefit of compulsory process for obtaining witnesses in their favor; and by authorizing their conviction on unsworn testimony of unknown witnesses. It indicts men for their associations and convicts them on speculations as to their state of mind.

It vests in the Attorney General the authority, by unreviewable decree, issued on the basis of ex parte and secret investigations, to proscribe groups and organizations. It gives our secret police jurisdiction over our beliefs and associations and accepts their accusations in secret without oath or cross-examination. Such a course is as dangerous to liberty in the United States as in Germany, Japan, Italy, or Russia. We have less excuse than they for taking it. We have a different tradition and we also have the warning of their experience.

Those who are accused are to be tried, moreover, not by judges dedicated to impartiality but by men "personally responsible for an effective program to assure that disloyal officers or civilian employees are not to be retained in employment." The judges acquit at their personal peril, for they themselves may be brought to account for their acquittals. They are assigned the role of judges but are accountable as prosecutors.

To require men to hazard their reputations and their means of livelihood upon a hearing before a forum so constituted and applying such standards, in my opinion, makes a mockery not only of "due process" but of elementary standards of fairness.

The justification given by the Chairman of the Loyalty Review Board for the denial to government employees of the basic rights and procedural safeguards guaranteed by the Constitution to all others is that "*legally*, the government is entitled to discharge any employee for reasons which seem sufficient to the government, and without extending to such employee any hearing whatsoever." I doubt that the government's right in this respect is as free of legal limitation as the Chairman of the Loyalty Review Board contends. Even if we assume that the government may discharge its employees for reasons which are wholly arbitrary, may it discharge them for reasons which are wholly unconstitutional? May it,

for example, discharge an employee solely because of his religion, or because he has exercised his constitutional right of free speech or participated in peaceable assembly under circumstances and for purposes wholly unconnected with his job?

A finding of "disloyalty" is considerably more than a matter of hiring and firing. It is "punishment" in the truest sense of the word and, under the standards of the Order, may be punishment for activities which are entirely legal and which cannot be made illegal under our Constitution as it now stands.

If the Supreme Court correctly interpreted the Constitution in *United States v. Lovett*,[6] then the purposes, as well as the procedures, of the Executive Order are wholly unconstitutional.

In the *Lovett* case the issue before the court was the validity of a federal statute prohibiting compensation to three named individuals by any governmental agency. The trio had been found guilty by a congressional committee of "subversive" beliefs and "subversive" associations. The Supreme Court held that the statute barred the plaintiffs from government service and that "this permanent proscription from any opportunity to serve the government is punishment."[7] "It is the type of punishment," the court declared, "which Congress has only invoked for special types of odious and dangerous crimes such as treason . . . acceptance of bribes by members of Congress . . . and interference with elections by army and navy officers."[8] The Court ruled that the act inflicted punishment for activities which were entirely legal and that it accordingly constituted a "bill of attainder" in contravention of Section 9, Article 1 of the Constitution.

It is true that "bills of attainder" are ordinarily associated with legislative action. But is not the Chief Executive as much bound by constitutional safeguards as is the Congress? It is also true that in the *Lovett* case the tribunal which conducted the hearing was a committee set up by Congress and not by the President, but the Constitution does not vest judicial power in either of them. Article III vests it in the courts alone. At least Congress has the power, by proper legislative action, to establish courts. The President is not given even this authority.

Separate and apart from the constitutional questions above discussed, Section 2 of Article II of the Constitution does not give the President the complete and unlimited appointive power over government officials and personnel. It expressly provides that "the Congress may by law vest the appointment of such inferior officers, as they think proper, in the Presi-

[6] 328 U.S. 303 (1946). [7] Ibid., at 316. [8] Ibid.

dent alone, in the Courts of law, or in the heads of departments." Congress has vested in government agencies the appointive power over their own personnel. The President cannot by Executive Order take away a power which Congress itself has constitutionally conferred, nor do I think that he can relieve any such agency of the responsibilities which accompany its appointive power. Unless and until Congress has legislated on this subject, the agencies' responsibility cannot be shifted to the Loyalty Board or the Loyalty Review Board.

But even if every action proposed by the Executive Order could be sustained in the courts, I do not think that the government should be a party to the denial of basic constitutional rights on narrow legalistic grounds. On the contrary, it seems to me that it should assume leadership in promoting the spirit of the Constitution as well as preserving its letter. Certainly the federal government should not resort to the use of economic and social sanctions to accomplish results which it is forbidden to accomplish through the use of political and judicial sanctions by the very terms of the Constitution. The end result of such a trend, once set under way, is to undermine the rule of law and to replace responsible representative government with government by arbitrary power. Limited by no rule of law, such a government enforces its edicts without regard to the courts, because it uses sanctions which the courts do not recognize.

The responsibility for protecting the Constitution does not lie with any single government official or department. It is shared by all of us. Article VI of the Constitution requires that all executive and judicial officers, as well as members of the legislative bodies, both state and federal, "shall be bound by oath or affirmation, to support this Constitution." All, of course, are not expected to be experts in constitutional law, but when an action is proposed which strikes at the basic structure of our constitutional form of government, I do not think any government official should acquiesce or participate in it until he has given more serious consideration to the constitutional issues involved and obtained the best legal advice available. No official, however highly placed, can absolve another from the responsibility which accompanies his oath of office.

The loyalty program is a new departure in government so far as this country is concerned. It challenges principles which all Americans have been taught since school days to regard as fundamental. The nearest approximation to what is now proposed was the Alien and Sedition Laws, and we repented of them long ago.

At least the Alien and Sedition Laws provided for trials in the duly constituted courts under the procedural safeguards guaranteed by the

Constitution. The present program seeks to by-pass the courts and the constitutional safeguards by resorting to sanctions which the courts and the Constitution do not recognize. It is thus an even greater danger to our kind of government, for it ignores the "rule of law" and seeks to control people's actions and beliefs by methods outside of the law.

I fully recognize that ideas and associations can be a real source of danger. But the wrong method of fighting them can be an even greater source of danger. A democratic form of government must assume certain calculated risks. If it is unwilling to assume these risks, it ceases to be democratic. Our form of government rests on a base of substantive and procedural laws, the cornerstone of which is the Constitution. We cannot, of course, achieve absolute certainty in the interpretation and enforcement of these laws, and human error must be allowed for. But it is essential that we constantly strive for the nearest approximation of certainty that can reasonably be achieved. For any warping or weakening of the base upon which it rests endangers the structure of government itself. The disregard or perversion of these laws by those charged with responsibility for their administration and enforcement can be "subversive" activity of a most effective and dangerous kind.

LETTER FROM HAROLD J. LASKI

The *Review* has received the following letter from Professor Harold J. Laski concerning his article, *Morris Cohen's Approach to Legal Philosophy*, 15 Univ. Chi. L. Rev. 575 (1948):

In your summer issue, you were good enough to publish an article of mine on the legal philosophy of the late Professor Morris R. Cohen. In that article, I cited the writings of Judge Jerome Frank as an example of the trend towards anti-intellectualism in "realist" jurisprudence to which Professor Cohen was strongly opposed. Judge Frank has written to me to say that he thinks I do him serious injustice in ascribing to him an anti-intellectualist attitude; he refers me, moreover, to a large number of his articles to which I have no access here. But I am sure that Judge Frank is right and that I must be wrong. I should be grateful, therefore, if you would, at some appropriate place in your next issue, express the regret I feel at having placed Judge Frank's legal philosophy into a category to which he does not think it belongs.

THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 16 WINTER 1949 NUMBER 2

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NOTES

MAJORITY RULE AND THE RIGHT TO STRIKE

He [the worker] has a legal right under the federal constitution—and a natural right as a mortal—to work, not to do so, to quit, to be lazy, to go fishing.[1]

As part of their efforts to establish rules to govern the conduct of labor disputes, seven states have enacted legislation making it an unfair labor practice

[1] State ex rel. Dairyland Power Cooperative v. Wisconsin Employment Relations Board, 14 C.C.H. Lab. Cas. ¶ 64385 (Wis. C.C. Dane County, 1948), rev'd on other grounds 15 C.C.H. Lab. Cas. ¶ 64638 (Wis. S. Ct., 1948).

for employees to instigate or participate in a strike without first obtaining the approval of a majority of the workers in the plant or collective bargaining unit to which they are attached.[2] Five other states have passed similar legislation designed to regulate the "overt concomitants" of a strike.[3] Three of these statutes have been held unconstitutional;[4] one has been sustained;[5] while one other, the Colorado restriction, has been invalidated because of its inseverability from an otherwise unconstitutional provision.[6] These "strike restriction" provisions, as well as the sections of the Taft-Hartley Act which define illegal purpose strikes, will make it difficult for the Supreme Court to avoid some future consideration of the relation of the federal constitution to the so-called "right to strike."[7]

In a suit to enjoin the attorney general from bringing a criminal prosecution pursuant to the majority strike-vote provisions of the Michigan Labor Relations Act, the Circuit Court of Wayne County held unconstitutional those sections of the Act which outlaw any strike not approved by a majority of the employees of an appropriate collective bargaining unit.[8] Relying upon the rationale of Alabama, Kansas, and Oregon decisions dealing with similar legislation,[9] the Michigan court concluded that the right to strike was constitutionally protected. In consequence it held that a law subjecting an employee's right to strike to the approval of the majority vote of the collective bargaining unit was an unreasonable regulation in violation of the Fourteenth Amendment. An alternative argu-

[2] Ala. Gen. Acts (1943) 257, § 13; Fla. Gen. L. (1943) c. 21968, § 9 (3); Kan. L. (1943) c. 191, § 8 (3); Mich. Pub. Acts (1947) § 17. 454 (10); Minn. Stat. (Henderson, 1945) § 179.11 (8); Mo. Rev. Stat. (1947) § 10178.203; N.D.L. (1947) c. 242, § 11.

[3] Colo. Stat. Ann. (Michie, Supp., 1947) c. 97, § 94 (6) (2) (e); Del. L. (1947) c. 196, § 2 (e); Ore. Comp. Laws Ann. (1940) § 102-906; Utah L. (1947) c. 66, § 49-1-16 (2) (c); Wis. Stat. (Brossard, 1943) § 111.06 (2) (e).

[4] Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810 (1944), cert. dismissed 325 U.S. 450 (1945); Stapleton v. Mitchell, 60 F. Supp. 51 (Kan., 1945), dismissed per stipulation sub nom. McElroy v. Mitchell, 326 U.S. 690 (1945); AFL v. Bain, 165 Ore. 183, 106 P. 2d 544 (1940).

[5] Hotel and Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board, 236 Wis. 329, 295 N.W. 634 (1941), aff'd 315 U.S. 437 (1942).

[6] AFL v. Reilly, 113 Colo. 90, 155 P. 2d 145 (1944).

[7] Watt, The New Deal Court, Organized Labor and the Taft-Hartley Act, 7 Lawyers Guild Rev. 193, 237 (1947). The Court might, however, avoid the necessity of such a consideration by turning its attention to the question of state conflict with federal legislation. For a general discussion of the permissibility of state labor legislation supplementing or conflicting with federal legislation see Killingsworth, State Labor Relations Acts (1948); C. Lamkin, Jr., The Madison Act and Recent Developments, 4 Mo. Bar J. 117 (1948); R. Smith, The Taft-Hartley and State Jurisdiction over Labor Relations, 46 Mich. L. Rev. 593 (1948). The Supreme Court has invalidated state legislation which frustrates the policy or limits the rights expressed in the National Labor Relations Act. Bethlehem Steel Company v. New York State Labor Relations Board, 330 U.S. 767 (1947); Hill. v. Florida, 325 U.S. 538 (1945); see Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942).

[8] UAW v. McNally, 15 C.C.H. Lab. Cas. ¶64684 (Mich. C.C. Wayne County, 1948).

[9] Note 4 supra.

ment by the plaintiff union alleged conflict between the Michigan strike-vote provision and the federal strike policy expressed in the Taft-Hartley Act.[10] The Michigan court approved this contention, pointing out that the states cannot impair or modify federal control over the exercise of collective bargaining rights and that "under existing conditions, it is impossible to dissociate the strike from the process of collective bargaining."[11]

Having withstood the hostile treatment of unsympathetic courts and legislatures, the primary strike (as distinguished from the sympathetic strike, jurisdictional strike, and secondary boycott) has, in the United States, come to be recognized both by courts and by legislatures as a legitimate economic weapon in support of labor's demands for improvement in wages, hours, and conditions of employment.[12] The present legal status of the primary strike to a very great extent reflects historical changes in the American attitude toward the position of organized labor in the structure of competitive capitalist enterprise.[13] These changes have precipitated unresolved problems of far-reaching importance. Perhaps foremost among such problems is whether the primary strike is to be considered as simply one element in a legislative labor policy designed to promote the achievement of more effective collective bargaining or whether it is to be put into that special class of civil liberties ultimately defined and protected by the judicial department of government. Should the Supreme Court adopt it into the family of constitutionally protected rights, results may follow that are not presently contemplated by the chief advocates of its incorporation into the safety of constitutional immunities. If, like picketing, the primary strike finds its way into the Constitution, it is not unlikely that the result will have a measurable effect upon the principles of collective bargaining.

The term "strike" generally denotes a movement growing out of problems arising between an employer and his employees relating to wages, hours, or conditions of work, in the course of which there is a concerted suspension of employment by the employees for the purpose of obtaining or resisting a change in the terms of employment.[14] Most American jurisdictions accept the view that employees who are not bound by a contract for a definite period or who have not voluntarily given up the right to strike may, singly or collectively, without

[10] Labor-Management Relations Act, 61 Stat. 136–61 (1947), 29 U.S.C.A. § 151 et seq. (1947), hereafter called the Taft-Hartley Act. Section 13 of the Act provides: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

[11] UAW v. McNally, 15 C.C.H. Lab. Cas. ¶64684 (Mich. C.C. Wayne County, 1948); see note 7 supra.

[12] As late as 1921 the participation in a strike was viewed as prima facie actionable if not justified by some standard of public policy; see Strikes and Boycotts, 34 Harv. L. Rev. 880, 881 (1921).

[13] Watts, The Right To Strike, 9 U. of Pitt. L. Rev. 243 (1948); Mason, The Right To Strike, 77 U. of Pa. L. Rev. 52 (1928); Storey, The Right To Strike, 32 Yale L. J. 99 (1922).

[14] See Webster's International Dictionary (1947); 31 Am. Jur. Labor § 191 (1940).

liability abandon their employment at any time for the purpose of compelling or attempting to compel their employers to accede to their demands for better terms or conditions of employment.[15] In at least seven jurisdictions this right to strike arises by implication from the worker's right to do in concert that which he might do individually—quit work.[16] Without directly referring to the Constitution, these courts seem to reach the result on the basis of the involuntary servitude prohibition of the Thirteenth Amendment. It is undisputed that strikes for unlawful purposes or strikes conducted in an unlawful manner may be prohibited.[17] But a constitutionally protected right to strike questions the propriety of a legislative definition of "lawfulness" in terms of the number of employees who approve of taking strike action. Might not the courts strike down such legislative efforts to define lawfulness by holding that "the denial of such a right to the members of a minority is no less an unconstitutional abridgement of the right simply because it is saved to the majority"?[18]

To avoid the danger that restrictions on the right to strike might be invalidated because of a possible conflict with the Thirteenth Amendment, the Michigan Labor Relations Act, like the Taft-Hartley Act, contains a clause to the effect that nothing in the Act should be construed to make the quitting of labor by an individual employee an illegal act.[19] That the Thirteenth Amendment secures the right of individuals to quit work need not be questioned.[20] That it may, as a derivative of this protection, secure the right to strike is open to controversy. There is a legal and conceptual distinction between the right to quit employment and the right to suspend employment in concert to produce some desired result.[21] Both organized labor and the Taft-Hartley Act regard the

[15] Beck v. Teamsters' Protective Union, 118 Mich. 497, 77 N.W. 13 (1898); Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753 (1906); Bossert v. Dhuy, 221 N.Y. 342, 117 N.E. 582 (1917); authorities cited 31 Am. Jur. Labor § 192 n. 17 (1940). Properly phrased the right of employees in these cases should be stated not as the right to strike, but as the right not to be punished for striking. In Hohfeldian terms the right sustained by the above courts is more accurately a privilege. "Developing Ethics" and the "Right To Strike," 32 Yale L.J. 157 (1922).

[16] Hardie-Tynes Manufacturing Co. v. Cruse, 189 Ala. 66, 66 So. 657 (1914); Truax v. Bisbee, 19 Ariz. 379, 171 Pac. 121 (1918); The Illinois Malleable Iron Co. v. Michalek, 279 Ill. 221, 116 N.E. 714 (1917); Saulsberry v. Coopers International Union, 147 Ky. 170, 143 S.W. 1018 (1912); Bohn Manufacturing Co. v. Hollis, 54 Minn. 223, 55 N.W. 1119 (1893); Roddy v. UMW, 41 Okla. 621, 139 Pac. 126 (1914); Jensen v. Cooks and Waiters' Union, 39 Wash. 531, 81 Pac. 1069 (1905).

[17] Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941); Dorchy v. Kansas, 272 U.S. 306 (1926); Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, 2 F. 2d 993 (D.C. Ill., 1924); UAW v. Wisconsin Employment Relations Board, 250 Wis. 550, 27 N.W. 2d 875 (1947).

[18] AFL v. Bain, 165 Ore. 183, 106 P. 2d 544 (1940).

[19] Taft-Hartley Act § 502; Mich. Stat. Ann. (Henderson, Supp. 1947) § 17.454 (14.1).

[20] Pollock v. Williams, 322 U.S. 4 (1944); The Reach of the Thirteenth Amendment, 47 Col. L. Rev. 299 (1947).

[21] Exchange Bakery and Restaurant, Inc., v. Rifkin, 245 N.Y. 260, 157 N.E. 130 (1927); Gerhart, Strikes and Eminent Domain, 30 J. Am. Jud. Soc. 116 (1946).

striker as an employee whose work has been suspended rather than terminated.[22] Strike-vote statutes do not so much impair the right to quit work as restrict the concerted suspension of employment in its use as a labor weapon.[23]

Grounds for bringing the primary strike within the protection of the Constitution may perhaps be more easily found by a process of analogy to the Supreme Court's identification of picketing and free speech. One court has said as much: "It would be but a hollow principle to say a union is free to advertise a labor dispute by picketing but may not strike to enforce its demands."[24] The first indication that picketing might be construed as a form of free speech appeared in 1936 in the *Senn* case.[25] Three years later, in the famous *Thornhill* case, the identification was stated in unmistakable terms.[26] Subsequent decisions set out the scope of the new doctrine. Picketing may not be prohibited merely because of the fact that the disputants do not stand in the proximate position of employer and employee[27] nor because the picketed establishment is operated without employees.[28] In addition if it is "practically impossible" for a union to make known its grievances by another means, picketing the premises of a retailer who purchases from the wholesaler with whom the union has a grievance must be permitted.[29] Although the Supreme Court has not ruled on the precise point, it is also apparent that picketing may not be forbidden on the sole ground that no employee majority has authorized such action by a strike vote.[30]

It is clear that striking involves more than the right to quit and equally clear that picketing involves more than the right to speak. Relating the primary strike, therefore, to the Thirteenth Amendment would require an extension no more strenuous than that which brings picketing within the content of the First and Fourteenth Amendments. Aside from its possible relation to the Thirteenth Amendment, the strike may be viewed in conjunction with the free speech doctrine. If the Supreme Court may hold that the Constitution protects the right to use concerted coercion for advertising labor disputes in the form of picket lines, might it not with equal justification hold that strikes are "so enmeshed with the right of free speech as construed in recent federal decisions that the right to strike and the right to picket are but facets of the [same] general prin-

[22] Taft-Hartley Act § 2 (3).

[23] 2 Teller, The Law Governing Labor Disputes and Collective Bargaining § 398.8 (Supp., 1948).

[24] Hotel and Restaurant Employees International Alliance v. Greenwood, 249 Ala. 265, 273, 30 So. 2d 696, 701 (1947); see In re Porterfield, 28 Cal. 2d 91, 168 P. 2d 706 (1946).

[25] Senn v. Tile Layers Union, 301 U.S. 468 (1937).

[26] Thornhill v. Alabama, 310 U.S. 88 (1940).

[27] AFL v. Swing, 312 U.S. 321 (1941).

[28] Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943).

[29] Bakery and Pastry Drivers and Helpers v. Wohl, 315 U.S. 769 (1942).

[30] AFL v. Bain, 165 Ore. 183, 106 P. 2d 544 (1940).

ciple"?[31] This indeed seems to be the reasoning employed by one federal court, the Supreme Court of Alabama, and the Michigan court in the instant case in nullifying statutes which require a majority vote for the authorization of a strike.[32] Statutes requiring a majority strike vote for taking part in the "concomitants" of a strike fall even more clearly within the scope of the picketing-free-speech doctrine, since picketing is itself the principal strike concomitant. This latter group of statutes might be saved, however, if as in Wisconsin the courts interpret the restriction to apply only to such picketing as lies outside the area of constitutional protection.[33]

The contemporary effort to derive a constitutional basis for the right to strike by an extension of the identification of picketing and free speech is not likely to find favor in the United States Supreme Court.[34] The association of picketing with the First and Fourteenth Amendments has met with serious criticism,[35] and the Court itself has permitted restrictions on picketing not altogether consistent with its earlier opinions. Without specifying the circumstances, the Court has let it be known that the free speech doctrine would not preclude the enjoining of an "unlawful strike."[36] It has upheld injunctions prohibiting picketing carried on outside the industry in which the dispute arose[37] or away from the situs of the dispute.[38]

In view of the industrial character of the national economy, it has been suggested that the primary strike might be encompassed within the term "liberty" of the Fifth and Fourteenth Amendments.[39] Even if it is conceded that the right to strike is not itself constitutionally protected, legislation which discriminates against a class composed of a minority group of workingmen might arguably

[31] Hotel and Restaurant Employees International Alliance v. Greenwood, 249 Ala. 265, 273, 30 So. 2d 696, 701 (1947).

[32] Stapleton v. Mitchell, 60 F. Supp. 51 (Kan., 1945); Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810 (1944); UAW v. McNally, 15 C.C.H. Lab. Cas. ¶64684 (Mich. C.C. Wayne County, 1948).

[33] Hotel & Restaurant Employees International Alliance v. Wisconsin Employment Relations Board, 236 Wis. 329, 295 N.W. 634 (1941), aff'd 315 U.S. 437 (1942).

[34] As between picketing and striking, labor usually regards the latter as the more basic economic weapon, and yet because the former is more easily identified with the constitutional guarantee of free speech it has had prior recognition by the Supreme Court. It is curious to note how the advocates of a constitutional right to strike have sought to safeguard this prior right by relying upon an analogy to a secondary or derivative right already secured.

[35] Teller, Picketing and Free Speech, 56 Harv. L. Rev. 180 (1942); Gregory, Labor and the Law, c. 12 (1946).

[36] Bakery and Pastry Drivers and Helpers v. Wohl, 315 U.S. 769 (1942).

[37] Carpenters & Joiners Union, Local 213 v. Ritter's Cafe, 315 U.S. 722 (1942).

[38] Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942).

[39] 58 Albany L. J. 435 (1898).

impair the guarantee of equal protection of the laws. Although neither of these contentions has received any serious consideration by the courts, the right to strike is a symbol too closely associated with the emancipation of American labor for the courts tacitly to permit its arbitrary infringement. Should the Supreme Court view a state statute as seriously jeopardizing the use of the strike weapon, it is more likely to invalidate the legislation by finding conflict with an existing uniform federal labor act, such as the Taft-Hartley Act, than by passing squarely on the constitutional basis of the right to strike.[40]

But whether a right to strike can or cannot be discovered within the flexible safeguards of the Constitution, it is important to discern the effects that such a discovery would have upon our present policy of collective bargaining. The collective bargaining principles of both the old and amended Labor Relations Acts are predicated on the theory of majority rule. While the individual employee retains his rights to take up personal grievances with his employer, Section 8 (a) (5) of the Taft-Hartley Act requires the employer to recognize the majority representative of the collective bargaining unit as the "exclusive" bargaining agent for all employees within the unit. The employer's duty to bargain with the properly designated bargaining agent imposes a correlative duty to refrain from circumventing such agent by negotiating directly with individuals or with a minority group.[41] The majority rule principle has been advanced by labor leaders as a platform for improving the position of organized labor.[42] Since a minority has no right to enter into separate bargaining arrangements, it should have no right to take independent action to interfere with the course of bargaining carried on by the majority.[43]

The extension of constitutional protection to the primary strike would materially affect these policies by creating in the individual a new right which might not be abridged by majority control.[44] This is, in fact, the very sort of control which the Michigan court has said must not be exercised. The right of the minority to strike would offer more shadow than substance to a group of workingmen whose employer has by law been forbidden from bargaining with them. The wildcat strike would wear the sanctity of constitutional protection while both the employer and a majority of his employees would be forced to suffer interruption of their collective agreements. The union might, of course, discipline its own dissident elements, and the employer might replace or discharge the nonunion strikers for participating in an unauthorized strike,[45] but what con-

[40] See note 7 supra.

[41] J. I. Case Co v. NLRB, 321 U.S. 332 (1944); Virginia Railroad Co. v. System Federation, 300 U.S. 515 (1937); NLRB v. Hyland Shoe, Inc., 119 F. 2d 218 (C.C.A. 1st, 1941); NLRB v. Brashear, 119 F. 2d 379 (C.C.A. 8th, 1941).

[42] Pressman, Improvements of the Processes of Collective Bargaining, 12 Mo. L. Rev. 10 (1947).

[43] NLRB v. Draper Corp., 145 F. 2d 199 (C.C.A. 4th, 1944).

[44] Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810 (1944).

[45] NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

tent would then remain to the individual's constitutionally protected right to strike? A judicial policy designed to protect an individual or minority right to press for separate labor agreements and a legislative policy designed to promote collective security would produce inconsistency and tension.

On its face the strike-vote provision aims at insuring democratic procedures in industrial controversies. Such legislation is said to be designed both to assure the employer and the majority of his employees that their collective agreements will not suffer at the hands of a dissonant minority and to guard against irresponsible labor leaders who call strikes without first consulting their membership.[46] However, the strike-vote provision has some features which, from the point of view of organized labor, are undesirable. It may seriously delay the calling of a strike, and it might indirectly outlaw "stranger picketing."[47] In addition, under such a provision a union which becomes exclusive bargaining agent by virtue of securing a small majority in the collective bargaining unit may receive the approval of a majority of its own members and still be prohibited from going on strike because it has failed to procure an absolute majority of all employees in the unit. However, the decision as to the wisdom or necessity for promoting these measures should be within the legitimate province of the legislature. Extending constitutional protection to the primary strike would seriously affect the legislature's power to formulate a comprehensive labor policy.[48]

The pressure to create constitutional safeguards for particular economic policies is, in effect, an expression of uneasiness over the possible fate of these policies in the hands of the legislature. But the attempt to transfer power from the legislatures to the courts can succeed only in placing control in the hands of officials further removed from the influences of popular sentiment and public control. Democratic theory necessarily presupposes legislative rather than judicial government.[49] Moreover, the failure to secure constitutional guarantees for valued social or economic policies does not mean that such policies are left unprotected. Public opinion, legislative responsibility, and political feasibility

[46] Millis and Katz, A Decade of State Labor Legislation: 1937–47, 15 Univ. Chi. L. Rev. 282, 301 (1948).

[47] Killingsworth, State Labor Relations Acts 65 (1948). But a Florida court has held that the strike-vote clause does not affect the rights of persons not employed by the picketed establishment. Whitehead v. Miami Laundry Co., 36 So. 2d 382 (Fla., 1948).

[48] "All rights are derived from the purposes of society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat." Justice Brandeis, dissenting in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 448 (1921).

[49] See, for example, Corwin, Liberty Against Government (1948); Carr, The Supreme Court and Judicial Review (1942).

are equally effective checks against arbitrary or impetuous governmental action. A political democracy knows other than constitutional securities.

CONFLICT BETWEEN LOCAL AND NATIONAL INTERESTS IN ALIEN LANDHOLDING RESTRICTIONS

Early in 1948 the Supreme Court of the United States handed down its opinion in *Oyama v. California*,[1] the latest in a line of cases in which that court has considered state restrictions on alien landholding. Two concurring[2] and two dissenting[3] opinions make articulate a wide divergence in view as to the wisdom of condemning the California statute in whole or in part. By the terms of this alien land law a presumption is created that any conveyance to an eligible landholder is made with intent to avoid the statute if an ineligible alien pays the consideration for the conveyance. Oyama's minor citizen son was here the eligible landholder. Intent to avoid the statute by such a conveyance results in escheat to the state. Though the decision was specifically limited to declaring the statutory presumption unconstitutional, a dictum in a succeeding case[4] indicates that a wider effect may be given to the holding than was at first apparent. If this is true, aliens may in the future again invoke the equal protection and due process guarantees of the Constitution, an approach unsuccessfully attempted in 1923.[5]

In any event, the issue is at a critical stage which justifies a study of the historical origin of a theory sanctioning the exercise of an obviously discriminatory power by the states. For the decisions in these cases make clear a strong presumption of statutory validity, founded squarely on history and tradition. It has been contended that "the public policy of prohibiting the alien ownership of real property, except in very limited cases, has been an outstanding principle of the common law almost since its inception."[6] But the same principle of the common law is one completely at variance with the exercise by the states of

[1] 332 U.S. 633 (1948).

[2] Justices Black and Murphy wrote concurring opinions. Justice Douglas joined Justice Black and Justice Rutledge joined Justice Murphy. The Black-Douglas opinion suggested that the California statute was inconsistent with federal powers over immigration and foreign affairs and denied to the alien the equal protection secured by the Fourteenth Amendment. Justices Murphy and Rutledge agreed that the law was based on racial prejudice and ought to be struck down under the Fourteenth Amendment.

[3] The dissents by Justices Reed and Jackson, with Justice Burton joining the former, denied that the California presumption was unreasonable if, as the majority opinion pointed out, the policy of the California legislature was not to be questioned.

[4] Note Justice Black's reference in Takahashi v. Game Commission, 334 U.S. 410, 421 (1948) to the cases cited in note 5 infra upholding the validity of the California and Washington alien land laws: "assuming the continued validity of such cases. . . ."

[5] Terrace v. Thompson, 263 U.S. 197 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Frick v. Webb, 263 U.S. 326 (1923).

[6] This was the argument of the state in Terrace v. Thompson, 263 U.S. 197, 206 (1923).

control over landholding by aliens. Restrictions on such landholding came into the common law in aid of the defense of England and as a product of her foreign policy. Since the United States government is constitutionally charged with the conduct of national defense and foreign affairs, both legal history and constitutional theory justify federal control of alien land laws.

It is hornbook learning that at common law an alien could not hold land. The restriction is often regarded as an inevitable part of the feudal system, by the very nature of which, it is said, landholding had to be restricted to citizens or subjects.[7] But aliens, citizens, and subjects as we now know them did not exist in the early feudal period. Indeed, in England such distinctions would have been impossible. England was conquered by "aliens," one of them became king, and land was distributed to his followers. Under the circumstances such a thing as a common English nationality was for a long time inconceivable. It was not unusual for a man to hold land in France and England as a subject of both the French and English kings.

Common-law restrictions on alien landholding began in the thirteenth century with the crown's long struggle to maintain its claims to Normandy and other continental provinces. The English king in theory remained the Duke of Normandy, and allegiance from landholders there was due to him. The French, however, slowly occupied Normandy and compelled the lesser lords to obedience.[8] It was considered by the English that the crown was being deprived of its rights to land in France, and in retaliation the English king seized the lands of Frenchmen and Normans in England. This established the "precedent." Efforts to retain the remaining possessions of the English crown in France led eventually to the Hundred Years' War, and during this time the common law developed the principle that aliens could not hold land.

Early in this period, it was not considered that the land seized had been permanently lost to the French or Norman tenant, and it was felt that he might well resume possession when peace came.[9] Thus, some of the land seized was granted to new tenants with a proviso that it might be taken back when the

[7] The explanation is generally that all land was held of the king and that to hold land of the king implied fealty to the sovereign. Fealty meant that one had to bear true faith and allegiance in opposition to all men. One born in a foreign country bore a natural allegiance to that country's sovereign from which he could not divest himself. Thus an alien could not bear fealty to the English king, since this would be in conflict with the alien's natural allegiance to the foreign king. The Laws Relating to Aliens, 3 Law. Mag. (n.s.) 264 (1845); Bailey, Rights and Duties of Aliens within National Boundaries, 15 Ky. L.J. 196, 199–200 (1927).

[8] Normandy was lost in the period 1189–1204, but the loss was not accepted by the English king till 1259. Tout, France and England 78 (1922).

[9] 1 Pollock and Maitland, History of English Law 460 (1899); Holdsworth, History of English Law 85 (1938); Selden Society, Select Cases Before the King's Council 1243–1482, xlvii–xlix, lxxiii (1918). Some of the treaties signed in the intervals of peace specified that the lands be returned to the aliens. See Molyns v. Fiennes (1365), reprinted in Selden Society, Select Cases before the King's Council 49 (1918), wherein on petition to King's Council such a treaty was carried into execution.

Normans recognized the English king as their overlord. It is of this early time that Bracton speaks when he writes that "if a man living in obedience to the king of France claims land against you, you may except against him."[10] This exception was considered a dilatory plea which served to bar an action only until peace was established and the king's rights were recognized in France. The French were the only aliens who had to be considered in this respect. There were other foreigners in England, but they were merchants who were without claims to or desires for English land.[11]

But permanent peace never came, and in time Bracton's dilatory exception became peremptory. The plea that "you are the subject of a king who is at war with our king and you may not be answered here, for Englishmen are not answered in France" becomes simply "you are an alien." Thus it came to be the law that aliens could not hold land in England—not because of anything inherent in the feudal system[12] but as an "exaggerated generalization" of the habit of seizing the lands of Frenchmen.[13]

Once the basic principle was established, the consequences were carefully worked out. Though an alien could not *hold* land, clearly he could *take* land by act of a person.[14] Thus a deed, gift, or devise gave the alien a title good against all the world except the crown.[15] Even as against the crown the alien held until,

[10] Bracton, De Legibus Angliae § 427b; see ibid., at §§ 298, 415b, 428b.

[11] Pollock and Maitland, op. cit. supra note 9, at 462.

[12] The usual argument that tenure meant that one could hold land under only one sovereign seems to be refuted by Bracton. Even in the event of war between two kingdoms in both of which a landowner holds land, the landowner could retain his land. He had to contribute personal service to the lord to whom he had sworn allegiance by homage, but he also had to insure the presence of forces due from him in respect to land held in the opposing kingdom. Bracton gives the names of some people who acted on this basis during the struggle for Normandy. Bracton, op. cit. supra note 10, at 427b. Thus Blackstone's statement that without restrictions on landholding by aliens "the design of introducing our feuds, the defense of the kingdom, would have been defeated," seems incorrect. 2 Bl. Comm. *249.

[13] "The truth seems to be that in the course of the thirteenth century our kings acquired a habit of seizing the lands of . . . Frenchmen. . . . To us it seems that the king's claim to seize the lands of aliens is an exaggerated generalization of his claim to seize the lands of his French enemies." Pollock and Maitland, op. cit. supra note 9, at 462–63. Holdsworth, op. cit. supra note 9, at 85 states, "Historically the rules of the common law as to the incapacity of the alien to own land inverts the order of cause and effect—it was because the king had seized the lands of these Normans that the common law arrived at its settled rules as to the . . . incapacity of the alien to hold English land."

[14] Co. Litt. *2b; 1 Bl. Comm. *371; 1 Bacon's Abridgment 172 (7th ed., 1832); Shepard's Touchstone *56; Comyns, Digest of Laws of England 545 (5th ed., 1822); Kent, Comm. *55.

[15] Anon., Goulds. 29 (1576) (alien purchased land and before an office found [note 16 infra] was convened the Queen made him a denizen. It was held that the land was not in escheat to the Queen before office found and that her confirmation of the alien's title was good); see Burk v. Brown, 2 Atk. 397, 398 (Ch., 1742), where Lord Hardwicke said, "An alien, to be sure, is capable of taking by purchase; but by that is meant a conveyance at common law, or any other kind of purchase. . . ." The American cases follow the common law where no statute interferes. McKinley Creek Mining Co. v. Alaska United Mine Co., 183 U.S. 563 (1901);

by an inquest of office found,[16] he was divested of whatever right he had, and title was given the king.[17] Until such time as an office was found against him the alien was entitled to all the rents and profits of the land. He had such right as to be able to suffer a common recovery and bar an entail.[18] But he could not by deed pass a title which was good as against the crown,[19] and on his death title to the property passed to the king without the necessity of an office found even if the alien had tried to devise the land to others.[20]

Since he could not hold the land, the law would not aid him in taking. That is, though an alien might take by act of the parties, he could not take by act of law, for, it was said, the law would not frustrate itself by doing what would later have to be undone. Therefore, an alien could not take as an heir nor by dower or curtesy.[21] If there were other heirs of equal degree who could take, the

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Manuel v. Wulff, 152 U.S. 505 (1893); Phillips v. Moore, 100 U.S. 208 (1879); Osterman v. Baldwin, 6 Wall. (U.S.) 116 (1867); Cross v. DeValle, 1 Wall. (U.S.) 5 (1863).

[16] Blackstone describes office found as "an inquiry made by the king's officers . . . or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to possession of lands or tenements, goods or chattels. This is done by a jury of no determinate number . . . to inquire whether . . . C, who has purchased lands, be an alien; which is another case of forfeiture. . . ." 3 Bl. Comm. *258.

[17] Page's Case, 5 Co. 52a (1588) (property was devised to one made a denizen before the death of the testator. The letters of denization were mistakenly dated after testator's death. Upon an office found against the devisee, an alien born, it was held that a commission for an inquest of office found to entitle the crown to the estate and possession of the lands must be under the Great Seal. Since this commission was under the Exchequer Seal, it was void as against the devisee); Duplessis v. Attorney General, 1 Brown P.C. 415 (H.L., 1753) (the crown may invoke the aid of equity to discover the fact of alienage under an inquest of office found, for an alien holds real interests only for the benefit of the crown; but the latter can only recover the land by a commission under the Great Seal, and to prove the facts is entitled to the assistance of a court of equity). For the same case in the Court of Exchequer see Attorney General v. Duplessis, 2 Ves. Sr. 286 (Exch., 1751); see also Attorney General v. Weeden & Shales, 1 Park 267 (1699) (inquest of office found is necessary to recover the chose in action of an alien enemy). The United States Supreme Court follows similar rules. Fairfax's Devisee v. Hunter's Lessee, 7 Cranch (U.S.) 602 (1813); Society for the Propagation of the Gospel in Foreign Parts v. New Haven and W. Weaver, 8 Wheat. (U.S.) 464 (1823).

[18] Anon., Goulds. 102 (1588) (an alien born purchased land in tail with a remainder to a stranger in fee. The alien suffered a common recovery to his own use in fee and later an office was found against him. It was held that the Queen had a fee simple and that the remainder to the stranger was gone).

[19] Fish v. Klien, 2 Mer. 431 (Ch., 1817); Co. Litt. *42b: "But many that have capacity to take, are disabled to enfoeffe as . . . aliens borne"; see Radcliffe v. Roper, 10 Mod. 89 (Ch., 1712).

[20] Co. Litt. *2b; 1 Bacon's Abridgment 173–74 (7th ed., 1832): "If an alien purchase land and die, then the freehold is in the king without office found, because no man can take it as heir to an alien, therefore the freehold is cast upon the king. . . ."; 2 Bl. Comm. *249: "And as they [aliens] can neither hold by purchase nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit; but so it is expressly holden because they have not in them any inheritable blood." This view was accepted in Blight's Lessee v. Rochester, 7 Wheat. (U.S.) 534 (1822).

[21] Collingwood v. Pace, 1 Keb. 65 (C.P., 1661), and see opinion of Bridgman, C.J., in Bridg. 410 (1661); Thomas v. Acklam, 2 Barn. & Cress. 779 (K.B., 1824); see Rittson v.

alien would simply be ignored. For a long time it was held that an inheritance could not be traced through an alien. The extremes to which the concept was pushed is illustrated by a holding that one of two brothers, native-born Englishmen of an alien father, could not be the heir of the other, for descent would have to be traced through the father who had no "inheritable blood."[22] This opinion seems later to have been overruled by the courts,[23] though some uncertainty remained until the law was later clarified by statute.[24]

Equity followed the law,[25] although doctrines peculiar to equity could make some differences in the results which might occur in a particular case. Thus, the doctrine of equitable conversion would turn "land into money" in a situation where real estate was left in trust to be sold and the proceeds delivered over to an alien legatee.[26]

To these rather rigid rules only one exception was recognized. For purposes of trade, friendly alien merchants were allowed to hold the lease of a house.[27] Though this exception was later broadened to include all aliens,[28] on the whole the rules against alien landholding remained until 1870. In that year a statute abolished the disability, and aliens were granted the same rights as English subjects to hold, transfer, and inherit land.[29]

Problems involving the landholding disability of aliens arose almost im-

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Stordy, 3 Small & Giff. 230 (Ch., 1855). The point was apparently argued but not decided in Boistard v. Cumbwell (1243), reprinted in Selden Society, Select Cases before the King's Council 1243–1382, at 1 (1918). The American cases are Mager v. Grima, 8 How. (U.S.) 490 (1850); Levy v. McCartee, 6 Pet. (U.S.) 102 (1832); Inglis v. Sailor's Snug Harbour, 3 Pet. (U.S.) 99 (1830); Orr v. Hodgson, 4 Wheat. (U.S.) 453 (1819); Dawson's Lessee v. Godfrey, 4 Cranch (U.S.) 321 (1808).

[22] 2 Bl. Comm. *250; Co. Litt. *8a.

[23] Collingwood v. Pace, 1 Vent. 413 (Ex. Ch., 1664); for Bridgman's dissent see Bridg. 414 (1664).

[24] 11 & 12 W. III, c. 6 (1700); 25 Geo. III, c. 39 (1751).

[25] Sharp v. St. Saveur, 7 Ch. App. 343 (1871); Barrow v. Wadkin, 24 Beav. 1 (Ch., 1857); Rittson v. Stordy, 3 Small & Giff. 230 (Ch., 1855); Fourdin v. Goudey, 3 My. & Keene 383 (Ch., 1834); Fish v. Klien, 2 Mer. 431 (Ch., 1817); Burk v. Brown, 2 Atk. 397 (Ch., 1742); Rex v. Holland, Alleyn 14 (Ch., 1681).

[26] Craig v. Leslie, 3 Wheat. (U.S.) 563 (1818); Du Hourmelin v. Sheldon, 4 My. & Cr. 525 (Ch., 1839).

[27] ". . . as to a lease for years there is a diversity between a lease for years of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for years of lands. . . . For if he takes a lease for years . . . [of the latter] upon office found the king shall have it. But of a house for habitation he may take a lease for years as incident to commerce, for without habitation he cannot merchandize or trade. . . . But if the alien be no merchant, then the king shall have the lease for years albeit it were for habitation. . . ." Co. Litt. *2b; Pollock and Maitland, op. cit. supra note 9, at 464–65.

[28] The alien in legal history, 163 L.T. 497, 498 col. 2 (1927); The Laws Relating to Aliens, op. cit. supra note 7, at 264 (1845).

[29] 33 & 34 Vict., c. 14 (1870); see The Land Law of Great Britain with Especial Reference to the Rights of Aliens, 18 Am. L. Reg. (n.s.) 465 (1879).

mediately when the United States became an independent nation. Many colonial landholders adhered to the British crown. As a result, many of the states passed laws declaring their lands forfeited to the state on the basis of the alienage of such persons.[30] The "Tories" argued against such statutes on the ground that British subjects born in the colonies before July 4, 1776 should not be considered aliens.[31] However, it was later settled that citizenship at the time the land descended, and not at birth, was controlling.[32] When cases arising out of the state forfeiture laws reached the Supreme Court, it accepted the common-law view of the landholding disability of aliens.[33] From this point of view the Court has never departed,[34] and today, unless modified by statute[35] or treaty,[36] alien landholding in the United States rests on the same basis as it did in England at the time of the American Revolution.

Statutes defining the ability of the alien to hold land have been enacted by the federal government.[37] Under these laws, aliens who are bona fide residents of the United States, or who have declared their intention to become American citizens, or whose right to hold land is secured by a treaty have landholding rights equivalent to those of citizens of the United States. These statutes are, however, restricted in their application to the Territories of the United States and to the District of Columbia.[38] But the statutes make it clear that Congress

[30] Examples are the Maryland statute involved in Smith v. Maryland, 6 Cranch (U.S.) 286 (1810); the Virginia statute in Fairfax's Devisee v. Hunter's Lessee, 7 Cranch (U.S.) 602 (1813); the New York statute in Harden v. Fisher, 1 Wheat. (U.S.) 300 (1816).

[31] McIlvaine v. Coxe, 2 Cranch (U.S.) 280 (1805); Lambert v. Paine, 3 Cranch (U.S.) 97 (1805). The argument was based on Calvin's Case, 7 Co. Rep. 1 (Ex. Ch., 1608), where it was held that a Scotchman born after the Scotch king had become the English king was not an alien, for he was born within the ligeance of the English king. Here it was argued that Englishmen and citizens of the United States were born within the same allegiance and thus could not be aliens in each other's countries.

[32] Dawson's Lessee v. Godfrey, 4 Cranch (U.S.) 320 (1808).

[33] Fairfax's Devisee v. Hunter's Lessee, 7 Cranch (U.S.) 602 (1813).

[34] McKinley Creek Mining Co. v. Alaska United Mining Co., 183 U.S. 563 (1901); Manuel v. Wulff, 152 U.S. 505 (1894); Phillips v. Moore, 100 U.S. 208 (1879); Osterman v. Baldwin, 6 Wall. (U.S.) 116 (1867); Cross v. DeValle, 1 Wall. (U.S.) 5 (1863); Mager v. Grima, 8 How. (U.S.) 490 (1850); Shanks v. Dupont, 3 Pet. (U.S.) 242 (1830); Inglis v. Sailor's Snug Harbour, 3 Pet. (U.S.) 99 (1830); Governeur's Heirs v. Robertson, 11 Wheat. (U.S.) 333 (1826); Blight's Lessee v. Rochester, 7 Wheat. (U.S.) 534 (1822); Craig v. Radford, 3 Wheat. 594 (1818).

[35] Blythe v. Hinckley, 180 U.S. 333 (1901); Griffith v. Godey, 113 U.S. 89 (1884); Sullivan v. Burnett, 105 U.S. 334 (1881); Beard v. Rowan, 9 Pet. (U.S.) 301 (1835); Spratt v. Spratt, 1 Pet. (U.S.) 343 (1828).

[36] Jordan v. Tashiro, 278 U.S. 123 (1928); Geoffrey v. Riggs, 133 U.S. 258 (1889); Hauenstein v. Lynham, 100 U.S. 483 (1879); Carneal v. Banks, 10 Wheat. (U.S.) 182 (1825); Jackson v. Clarke, 3 Wheat. (U.S.) 1 (1818); Chirac v. Chirac, 2 Wheat. (U.S.) 259 (1817); Harden v. Fisher, 1 Wheat. (U.S.) 300 (1816).

[37] 29 Stat. 618 (1897), 8 U.S.C.A. §§ 71, 72 (1942); 33 Stat. 733 (1905), 8 U.S.C.A. § 78 (1942).

[38] Alien landholding in Hawaii is governed by separate and more rigorous provisions. 42 Stat. 117 (1921), 8 U.S.C.A. §§ 83–86 (1942).

has not established, by enunciating a standard as to who may become a citizen, a national policy to determine who may hold land. Thus it can hardly be argued that state laws further any federal policy by basing the ability of an alien to hold land on his eligibility to citizenship under the naturalization laws.

Traditionally, questions of title, ownership, and inheritance of land are areas in which the several states take a dominant interest.[39] But the federal government can regulate the terms and conditions under which aliens may live within the states.[40] From the beginning of its foreign affairs the federal government has sought to handle the alien landholding question by treaty,[41] and today no federal statute exists which applies in terms to alien landholding within the states. Had such a statute been passed it could be argued that the federal government had occupied the field and that, thereafter, no state legislature could act in regard to alien landholding.[42]

The common-law rules as to alien ownership of land were developed, or at least justified, on ground of national defense. Lord Coke considered that these restrictions were intended to prevent a fifth column "as was excellently shadowed by the Trojan horse. . . ."[43] With this policy argument other eminent justices agree.[44] Blackstone, who based his argument for these restrictions on national defense, also suggested that tenurial notions were involved.[45] But the tenure explanation seems, in the light of later learning, clearly incorrect. It was not feudal tenurial notions but French enmity which first moved the English king to act. Expressed in modern terminology: Foreign policy and the power to make war, not land law, are the sources from which these alien restrictions arise.

[39] Blythe v. Hinckley, 180 U.S. 333 (1901); Beard v. Rowan, 9 Pet. (U.S.) 301 (1835); see also Jones v. Jones, 234 U.S. 615 (1914); Clarke v. Clarke, 178 U.S. 186 (1900); De Vaughn v. Hutchinson, 165 U.S. 566 (1897); United States v. Crosby, 7 Cranch (U.S.) 115 (1812).

[40] Hines v. Davidowitz, 312 U.S. 52 (1940); Henderson v. Mayor of New York, 92 U.S. 259 (1875); Chy Lung v. Freeman, 92 U.S. 275 (1875); Arrowsmith v. Vorhies, 55 F. 2d 310 (D.C. Mich., 1931); Ex parte Cue, 101 Cal. 197, 35 Pac. 556 (1894).

[41] The treaty with France of Feb. 6, 1778 provided (Art. 13) that the subjects and inhabitants of the United States "may by Testament . . . or otherwise dispose of their Goods moveable or immoveable in favour of such persons as to them shall seem good; and their Heirs, Subjects of the Said United States residing whether in France or elsewhere may succeed them *ab intestat*. . . . [and] The Subjects [of the French King] shall enjoy . . . an entire and perfect Reciprosity. . . ." 2 Miller, Treaties and Other International Acts of the United States 11, (1931); see also article 6 of the treaty with the Netherlands of October 8, 1782, ibid., at 65, (1931); articles 5 and 6 of the Preliminary Treaty of Peace with Great Britain of Nov. 30, 1782, ibid., at 98, 99 (1931).

[42] Hines v. Davidowitz, 312 U.S. 52, 68 n. 23 (1940).

[43] Calvin's Case, 7 Co. Rep. 12, 18b (Ex. Ch., 1608). Lord Coke also mentions that there might be a failure of justice, for aliens might get a great part of the land in the realm, and since aliens born "cannot be returned of juries" there would be no one to try issues of fact in the king's courts.

[44] Egerton (Lord Ellesmere), The Speech of the Lord Chancellor of England, in Exchequer Chamber, touching the Post-Nati 86, 87 (1609); Bridgman, C. J., in Collingwood v. Pace, Bridg. 415, 431 (Ex. Ch., 1664).

[45] 2 Bl. Comm. *249.

Our treatment of foreign nationals is an important and delicate aspect of international affairs. Discrimination, actual or imagined, has in the past led to grave international controversy and even to war.[46] In these circumstances to talk of alien landholding as a topic of interest primarily to the states is to ignore reality. In the event of war or a demand for indemnity "would California alone suffer, or all the Union?"[47] Clearly, "legal imposition of [restrictions] upon aliens . . . bears an inseparable relationship to the welfare and tranquillity of all the states, and not merely to the welfare and tranquillity of one."[48]

Failure to recognize this, and the consequent use of the power by the states rather than the federal government, have at times been most harmful to the relations of the United States with other nations. This can be made clear by a view of the circumstances under which the California statute was passed and the effects of the enactment. The act was passed only after years of intense racial agitation sparked primarily by local politicians, labor groups, and farmers. Presidents Roosevelt and Taft and Secretary of State Bryan successively intervened in 1907, 1911, and 1913 to prevent passage of the bill. In 1913 federal intervention failed and the bill became law. Passage of the law, and the propaganda which preceded it, led to great outbursts of anti-American feeling in Japan and the organization of numerous anti-American societies. Several times Japanese reaction to California policy pushed that country close to war with the United States, and there is little doubt that the discrimination embodied in the California act was used by Japanese propagandists to unify their own people and the people of Asia behind a policy of Japanese expansion.[49]

Traditionally, restrictions on the rights of aliens to hold land have been regarded as an aspect of land law and, therefore, of peculiar concern to the states. This view, it is suggested, overlooks both the lessons of history and the need for national unity in foreign affairs. The traditional position makes possible arguments about "unique economic considerations in this state" and less respectable polemics, motivated by selfishness or racial hysteria, devoted to the consequence of foreigners holding land. The logic of this position can accommodate the absurdity of permitting landholding by an eligible alien, who is non-resident and devoid of any intention of becoming a citizen or resident; yet an alien ineligible for citizenship may not hold land even though bound by residence, family, and means of livelihood to the United States.

Tradition and history leave much unanswered in the field of alien rights. Questions of civil and economic liberty are involved. But a national defense rationale is at least consistent with the history of the common law and seems

[46] Dunn, The Protection of Nationals (1932).

[47] Chy Lung v. Freeman, 92 U.S. 275, 279 (1875); see also cases cited note 40 supra.

[48] Hines v. Davidowitz, 312 U.S. 52, 65–66 (1940).

[49] A brief history of the California statute may be found in Justice Murphy's concurring opinion in Oyama v. California, 332 U.S. 631 (1948); see also McWilliams, Prejudice 14–71 (1946); Konvitz, The Alien and the Asiatic in American Law, c. 5 (1946).

constitutionally sound. It assures to the federal government a necessary power less likely to be subject to the abuses which have characterized California's efforts in this area. If discriminatory statutes are necessary, let them be based on considerations of national welfare and not on the racism and narrow economic or political considerations which have motivated state action denying special classes of aliens the right to hold land.

COMMON-LAW REGULATION OF THE IDEA MARKET

The tremendous commercial value of ideas today is perhaps nowhere so apparent as in the motion picture, radio, and advertising industries.[1] An "idea" that a musical comedy should have its scene set at Mackinac Island instead of Hawaii may be sufficient to cause the investment of hundreds of thousands of dollars and to make possible a gross profit in the millions. An "idea" that it would be desirable to abbreviate an advertising slogan for a popular-brand cigarette may result in a few cryptic letters being printed in countless issues of newspapers and magazines and being drummed into the ears of innumerable cigarette consumers via radio. Someone's suggestion that it would be a good idea to broadcast a disc jockey on a nation-wide radio hookup has consequences that are measurable in large sums. While the bulk of these ideas is probably originated within the studios and professional agencies,[2] a number are developed independently by professional free-lance writers and casual amateurs. These in turn are submitted to the industry in the abbreviated form of sketches and outlines. The extraordinary value which is placed upon minor variants of an idea and the striking similarity between such variants create complex problems in the marketing of ideas. These problems arise both from the possibility of literary piracy on the one hand and from the danger of spurious claims on the other.

The copyright laws do not solve the problem, since their protection is confined to authors whose material has been published,[3] while controversy in these cases springs from charges that unpublished material has been pirated. But the common law has long recognized an author's property right to his creation even before publication.[4] This protection is independent of[5] and unaffected by

[1] See Johnston v. Twentieth Century-Fox Film Corp., 187 P. 2d 474, 478 (Cal. App., 1947).

[2] The experience of radio station WGN, Chicago, seems to be typical of the entire field. With rare exceptions, unsolicited ideas have been independently developed by professionals working for the station.

[3] "The statutory right is of no value, *unless* there is a publication. . . ." Brandeis and Warren, The Right to Privacy, 4 Harv. L. Rev. 193, 200 (1890).

[4] See Caliga v. Inter-Ocean Newspaper Co., 215 U.S. 182, 188 (1909); Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 346 (1908); Wheaton v. Peters, 8 Pet. (U.S.) 591, 657 (1834); Frohman v. Ferris 238 Ill. 430, 435 (1909), aff'd 223 U.S. 424 (1912). Cf. Cal. Civ. Code (Deering, 1941) §§ 980, 983.

[5] See Paige v. Banks, 13 Wall. (U.S.) 608, 614 (1871); Little v. Hall, 18 How. (U.S.) 165, 170 (1855).

the copyright laws.[6] The theoretical foundation of relief is twofold: suit on the tort theory of appropriation of literary property, or suit on the basis of an express or implied contract arising from the manner in which the defendant gained access to the material.

The essential elements of proof under both theories are the same. In seeking to persuade the court that his material was in fact copied[7] the complainant must of course establish similarity.[8] He must also prove that his idea is novel.[9] Ideas which are common property cannot become the subject of an exclusive right.[10] Thus, a plaintiff who had recommended filming short movie features about unusual occupations was denied recovery on the thesis that, since similar films had been previously produced, his idea was not unique.[11] Furthermore, the plaintiff must establish that the defendant had access to his work.[12] It is of course evident that a successful action cannot be maintained if the defendant created or obtained his composition independently of the plaintiff.[13] The courts have observed that recurrence is not an inevitable badge of plagiarism.[14] Access may be inferred from similarity,[15] but there is no necessary logical relationship.[16]

[6] "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law . . . to prevent the . . . use of such unpublished work without his consent. . . ." 61 Stat. 652 (1947), 17 U.S.C.A. § 2 (Supp., 1948).

[7] Aside from the allegation of a contract, there is one subtle distinction between the two theories. In the appropriation cases the plaintiff seeks damages for the unauthorized use of the material, while in the contract cases the plaintiff does not complain of any unauthorized use but seeks damages for failure of the defendant to offer compensation.

[8] Similarity sufficient to establish copying may be found to exist if "the two works, when compared, show such pronounced similarities of substantial . . . protectible material." Barsha v. Metro-Goldwyn-Mayer, 32 Cal. App. 2d 556, 561, 90 P. 2d 371 (1939). "If dissection rather than observation is required to discern any resemblance, there is no piracy." Golding v. RKO Radio Pictures, Inc., 193 P. 2d 153, 162 (Cal. App., 1948). But it is not necessary that the works be exactly similar. Sheldon v. Metro-Goldwyn-Mayer, 81 F. 2d 49, 56 (C.C.A. 2d, 1936); see Stanley v. CBS, 192 P. 2d 495, 506 (Cal. App., 1948); Universal Pictures Co. v. Harold Lloyd Corp., 162 F. 2d 354, 361 (C.C.A. 9th, 1947); Barsha v. Metro-Goldwyn-Mayer, 32 Cal. App. 2d 556, 562, 90 P. 2d 371, 374 (1939).

[9] Plus Promotions, Inc. v. R.C.A. Mfg. Co., 49 F. Supp. 116 (N.Y., 1943); Liggett & Meyer Tobacco Co. v. Meyer, 101 Ind. App. 420, 194 N.E. 206, 210 (1935); Soule v. Bon Ami Co., 201 App. Div. 794, 195 N.Y. Supp. 574, 576 (1922), aff'd 235 N.Y. 609, 139 N.E. 754 (1923); Lueddecke v. Chevrolet Motor Co., 70 F. 2d 345, 348 (C.C.A. 8th, 1934); DeFilippis v. Chrysler Corp., 53 F. Supp. 977, 980 (N.Y., 1944); Comm'r v. Affiliated Enterprises, Inc., 123 F. 2d 665, 667 (C.C.A. 10th, 1941).

[10] See Wilkie v. Santly Bros., 91 F. 2d 978, 979 (C.C.A. 2d, 1937); Soule v. Bon Ami Co., 201 App. Div. 794, 195 N.Y. Supp. 574, 576 (1922), aff'd 235 N.Y. 609, 139 N.E. 754 (1923).

[11] Futter v. Paramount Pictures, Inc., 69 N.Y.S. 2d 438 (1947).

[12] See Twentieth Century-Fox Film Corp. v. Dieckhaus, 153 F. 2d 893, 894 (C.C.A. 8th, 1946), cert. den. 329 U.S. 716 (1946); Tamas v. Twentieth Century-Fox Film Corp., 25 N.Y.S. 2d 899, 900 (1941).

[13] See Wilkie v. Santly Bros., 91 F. 2d 978, 979 (C.C.A. 2d, 1937).

[14] See Futter v. Paramount Pictures, Inc., 69 N.Y.S. 2d 438 (1947); Darrell v. Joe Morris Music Co., 113 F. 2d 80 (C.C.A. 2d, 1940).

[15] Wilkie v. Santly Bros., 91 F. 2d 978, 979 (C.C.A. 2d, 1937).

[16] Similarity may not be adequate to establish access if there is direct evidence indicating no access or if the material is such as is likely to recur spontaneously. Twentieth Century-Fox

The access question is most acute in those cases where the idea has been channelled through a writer's agent, and conversely it is likely to be no problem in those cases where the material involved was directly submitted to the defendant.

But not all ideas will be shielded even though similarity, novelty, and access are proved. The courts will act to protect the author only if a "concrete combination of ideas" has been appropriated.[17] This concept is double-barrelled. It seeks to differentiate ideas according to completeness. Thus a rough outline of a projected film is not concrete, though a script may be. And it attempts to distinguish between a single idea and a combination of ideas. Scene, plot, characters, are component parts of a work which are not protected. It is only when they are "combined" into a whole that relief for appropriation will be granted.[18]

Film Corp. v. Dieckhaus, 153 F. 2d 893 (C.C.A. 8th, 1946), cert. den. 329 U.S. 716 (1946); Darrell v. Joe Morris Music Co., 113 F. 2d 80 (C.C.A. 2d, 1940).

[17] Stanley v. CBS, 192 P. 2d 495 (Cal. App., 1948); Thomas v. R. J. Reynolds Tobacco Co., 350 Pa. 262, 38 A. 2d 61 (1944); Plus Promotions, Inc. v. R.C.A. Mfg. Co., 49 F. Supp. 116 (N.Y., 1943); Stone v. Liggett & Myers Tobacco Co., 260 App. Div. 450, 23 N.Y.S. 2d 210 (1940); Williamson v. New York Central Ry. Co., 258 App. Div. 226, 16 N.Y.S. 2d 217 (1939); Downes v. Culbertson, 153 Misc. 14, 275 N.Y. Supp. 233 (1934).

Confusion may be created by those courts which insist that only the "expression" or "representation" of a work will be protected. O'Brien v. RKO Radio Pictures, Inc., 68 F. Supp. 13 (N.Y., 1946); Bowen v. Yankee Network, 46 F. Supp. 62 (Mass., 1942); Moore v. Ford Motor Co., 28 F. 2d 529 (D.C.N.Y., 1928), aff'd 43 F. 2d 685 (C.C.A. 2d, 1930); Thompson v. Famous Players-Lasky Corp., 3 F. 2d 707 (D.C. Ga., 1925); Fendler v. Morosco, 253 N.Y. 281, 171 N.E. 56 (1930); Schubert v. Columbia Pictures Corp., 189 N.Y. Misc. 734, 72 N.Y.S. 2d 851 (1947); Barsha v. Metro-Goldwyn-Mayer, 32 Cal. App. 556, 90 P. 2d 371 (1939); Cal. Civ. Code (Deering, 1941), § 980. These terms are employed interchangeably with the phrase "concrete combination of ideas," but they tend to suggest that precise similarity is a prerequisite to successful litigation. A requirement of identity as to language could easily be avoided. Accordingly the courts have looked beyond the language used to a comparison of the combination of ideas.

[18] However, a mere idea that appears to be neither developed nor a combination may be sold under an express contract drawn before disclosure, if the idea is both new and valuable. See Soule v. Bon Ami, 201 App. Div. 794, 195 N.Y. Supp. 574 (1922), aff'd 235 N.Y. 609, 139 N.E. 754 (1923), in which an express contract to pay half of the increased profits for an idea to raise wholesale prices was held not valuable information as specified in the contract. See Masline v. N.Y., N.H. & H. Ry. Co., 95 Conn. 702, 112 Atl. 639 (1921), criticized in 19 Mich. L. Rev. 874 (1921) on the ground that adequacy of consideration should not be questioned if the idea is regarded at the time the contract is made as the equivalent of the promise.

It has been suggested that abstract ideas should be capable of sale under implied in fact contracts and that their reasonable value should be recoverable in quasi-contractual actions. Ideas as Subject Matter of Express, Implied in Fact, and Implied in Law Contracts, 31 Corn. L. Q. 382, 385, 390 (1946); 40 Ill. L. Rev. 130 (1945), noting Grombach Productions, Inc. v. Waring, 293 N.Y. 609, 59 N.E. 2d 425 (1944); 36 Col. L. Rev. 1375, 1377 (1936), noting Ryan & Associates v. Century Brewing Ass'n, 185 Wash. 600, 55 P. 2d 1053 (1936). There is also some evidence of a tendency to relax the requirement of a "concrete combination" in the implied contract suits. Compare Yadkoe v. Fields, 66 Cal. App. 2d 150, 151 P. 2d 906, 910 (1944), an implied contract case with Stone v. Liggett & Myers Tobacco Co., 260 App. Div. 450, 23 N.Y.S. 2d 210 (1940), an appropriation case. It is submitted that neither the suggestion nor the trend is wise. The problem under both theories is the same: Has protectible material been pirated? Plaintiffs normally proceed under an implied contract theory when they have sub-

The cases, which are in hopeless confusion, illustrate the difficulties in applying this concept. An idea that a motion picture be built around the story of the Palace Theatre in New York, coupled with four brief suggestions for story treatment, was held insufficiently concrete.[19] A written suggestion that defendant company produce and distribute to its customers a graph of the direction in which the hair on an individual's face grows was held too abstract.[20] And a proposal that defendant advertise that its cigarettes burned approximately twice as long as competing brands was held to warrant no compensation.[21] By contrast, a letter embodying an idea for an advertisement in which a well-groomed gentleman offers a cigarette to his colleague who was to spurn the offer with the remark, "No thanks, I smoke Chesterfields," was held sufficiently concrete.[22] And a program outline entitled "Racketeer and Co." containing plans for a radio show featuring a district attorney at war with the underworld was held protectible in a suit against the producers of "Mr. District Attorney."[23]

A 1948 California decision[24] exemplifies the judicial process in these cases. The plaintiff who had submitted a format, sample script, and recording of a drama program to the defendant, alleged piracy in a suit based on breach of an implied contract. Judgment was entered for the plaintiff by a court which found substantial similarity not in the actual text of defendant's program but in its combination of ideas. The court found that the two program formats were similar in that in each:

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mitted unsolicited material to the defendants with a request for payment. These cases are not sufficiently different from situations where the defendant has had no direct contact with the plaintiff to warrant two definitions of concreteness.

[19] O'Brien v. RKO Radio Pictures, Inc., 68 F. Supp. 13 (N.Y., 1946); cf. Shubert v. Columbia Pictures Corp., 189 Misc. 734, 72 N.Y.S. 2d 851 (1947). But judgment for the plaintiff, in a suit for appropriation, was affirmed where the composition in question was a motion picture scenario. Thompson v. Famous Players-Lasky Corp., 3 F. 2d 707 (D.C. Ga., 1925); cf. Barsha v. Metro-Goldwyn-Mayer, 32 Cal. App. 2d 556, 90 P. 2d 371 (1939); Golding v. RKO Radio Pictures, Inc., 193 P. 2d 153 (Cal. App., 1948).

[20] Alberts v. Remington Rand, Inc., 175 Misc. 486, 23 N.Y.S. 2d 892 (1940).

[21] Thomas v. R. J. Reynolds Tobacco Co., 350 Pa. 262, 38 A. 2d 61 (1944).

[22] Liggett & Meyer Tobacco Co. v. Meyer, 101 Ind. App. 420, 194 N.E. 206 (1935). For comments on this case, see Logan, Legal Protection of Ideas, 4 Mo. L. Rev. 239, 256 (1939); 44 Yale L.J. 1269 (1935).

Compare Healey v. R. H. Macy & Co., Inc., 251 App. Div. 440, 297 N.Y. Supp. 165 (1937), aff'd 277 N.Y. 681, 14 N.E. 2d 388 (1938) (slogans and ideas for Christmas advertising campaign protected); Ryan & Associates, Inc. v. Century Brewing Ass'n, 185 Wash. 600, 55 P. 2d 1053 (1936) (slogan "The Beer of the Century" protected). Although the Ryan case was brought on a theory of quantum meruit for services rendered, a decision that the slogan was concrete was essential to the result. See Soclow, The Law of Radio Broadcasting 956 (1939), for the suggestion that the case represents a turning toward the view that there is property in an idea.

[23] Cole v. Phillips H. Lord, Inc., 262 App. Div. 116, 28 N.Y.S. 2d 404 (1941). On new trial, judgment was entered for defendant on the ground that the material was not novel.

[24] Stanley v. CBS, 192 P. 2d 495 (Cal. App., 1948).

the program was entitled "Hollywood Preview"; the title was repeated and emphasized throughout the production; the announcer introduced the master of ceremonies; the latter was prominent in motion pictures; he stated the title of the play and the name of the star; the drama was presented; it was a play not previously seen in motion pictures; its authors were named; listeners were asked to express their opinions of the play.[25]

Most of these items of identity are commonplace and could readily have been independently created by the defendant, but the court asserted that a "new or different combination of ideas will be protected against piracy [and] that commonplace materials may be made into a novel arrangement. . . ."[26]

The ambiguity of the concepts with the concomitant uncertainties of litigation, the absence of any rule for measuring damages,[27] and the threat of blackmail and nuisance suits has led the "hot idea" industry to develop self-protection devices. Unless a release has been executed, for example, radio stations and advertising agencies follow a general policy of returning unexamined the unsolicited ideas that come to them. The releases normally empower the station or agency to determine the originality of the material, the use to which it will be put, and the extent of the compensation which will be awarded. Some releases include a promise to indemnify the agency against any claims for libel, slander, infringement of copyright, violation of civil rights, and rights of privacy which may arise from use of the material. Other instruments of industry self-regulation have also been established. The Title Registration Committee of the Motion Picture Association of America settles by arbitration any disputes over similarities in film titles.[28] The Screen Writers' Guild provides a registration service to aid authors in establishing the completion dates and identity of their literary property. The Guild may also arbitrate charges of plagiarism arising between its members.[29]

But these devices cannot avoid or settle all disputes, and the resulting cases reflect the judicial attempt to reconcile the conflicting interests within the "hot idea" industry. The rationale for protecting the originator of a "hot idea" is not the same as that invoked for protecting a party whose copyright has been infringed. Copyright holders are shielded in the interest of stimulating artistic creativity. "Hot ideas," on the other hand, rarely constitute a valuable contri-

[25] Ibid., at 500.

[26] Ibid., at 505.

[27] In Yadkoe v. Fields, 66 Cal. App. 2d 150, 151 P. 2d 906 (1944), the damages were $8,000; in Stanley v. CBS, 192 P. 2d 495 (Cal. App., 1948), $35,000; and in Golding v. RKO Radio Pictures, 193 P. 2d 153 (Cal. App., 1948), $25,000.

[28] Memoranda of the Title Committee of the Motion Picture Ass'n of America, Inc., as amended to October 25, 1937 (mimeo).

[29] It has been suggested that all disputes in this field be submitted to arbitration. New Trends in the Protection of Ideas for Radio Programs, 10 Air L. Rev. 394, 404 (1939); Seidenberg, An Idea about Ideas, 1 Arbitration in Action 10 (1943). Although it is unlikely that boards of arbitration could apply standards different from those employed by the courts, their more expert knowledge of the industries would probably enable them to reach more satisfactory decisions.

bution to the culture of the community.[30] Nevertheless, the doctrine of unjust enrichment compels the conclusion that judicial relief should be available to the originator of material which has been appropriated. By the same token agencies are entitled to protection against blackmail and honest but unfounded claims. The present framework of common-law protection of "hot ideas" could probably be strengthened if litigation were discouraged through statutes similar to the federal copyright provisions, which impose reasonable attorneys' fees as part of the unsuccessful litigant's costs.[31] In addition where the material is unsolicited the requirements of "concrete combination" and novelty should be strictly enforced against the possibility of invalid claims. However, agencies which actively solicit material from free lance professionals and amateurs should be held to more stringent standards of liability. Any other rule would encourage controversy and handicap just and effective judicial administration of the "hot idea" industries.

VERBAL ACTS AND IDEAS—THE COMMON SENSE OF FREE SPEECH

Conviction for a breach of the peace may conceal a threat to the right of freedom of speech. The only cases in which the United States Supreme Court has been confronted by the presence of both concepts[1] did not require full exposition of their possible inconsistency. But a recent Illinois decision, *City of Chicago v. Terminiello*,[2] brings the question into sharp relief.

This problem, like any other involving the right of free speech, necessitates an understanding of the reasons that some speech is protected while other speech is punishable. The protection of the First Amendment may be invoked only when the words used are intended to convey ideas. Even though hostile in nature, these words will be protected because the "[u]ltimate good desire is better reached by free trade in ideas—that the test of truth is the power of the thought to get itself accepted in the competition of the market. . . ."[3]

[30] For a development of the theory that thoughts are protected not so much for considerations of value but as instances "of the more general right of the individual to be let alone," see Brandeis and Warren, The Right to Privacy, 4 Harv. L. Rev. 193, 204–5 (1890). For a suggestion that abstract ideas are unprotected because a mere abstraction is not of sufficient value to society, see Logan, Legal Protection of Ideas, 4 Mo. L. Rev. 239, 240 (1939). But see 36 Col. L. Rev. 1375, 1376 (1936), noting Grombach Productions, Inc. v. Waring, 293 N.Y. 609, 59 N.E. 2d 425 (1944), for the suggestion that ideas are not given the status of property because of the benefits to society from their free dissemination.

[31] See Caruthers v. RKO Radio Pictures, Inc., 20 F. Supp. 906, 908–9 (N.Y., 1937). The applicable section of the Copyright Act is 35 Stat. 1084 (1909), 17 U.S.C.A. § 40 (1937).

[1] Two important free speech cases have involved breach of peace prosecutions: Cantwell v. Connecticut, 310 U.S. 296 (1940); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); see also Cox v. New Hampshire, 312 U.S. 569 (1941).

[2] 400 Ill. 23, 79 N.E. 2d 39 (1948).

[3] Schenck v. United States, 249 U.S. 47, 52 (1919).

The characteristic of speech, then, which merits special consideration is its ability to convey truth. Alexander Meiklejohn has called this the public interest in speech as opposed to the private interest: Speech of public interest is absolutely protected by the First Amendment, but speech of private interest may be reasonably regulated or punished.[4] Words of idea-conveying nature, even though objectionable, will be protected because of the benefit to the public interest. But words of interest only to the individual will be punished when a different area of the public interest has been injured. Punishment follows according to what has been called the "normal criminal law of words."[5] For example, objectionable words may be punished because they are obscene and abusive or because they urge another to commit a crime.

Words of purely private interest may, of course, be so confined in their use as to preclude punishment.[6] Thus, the defendant in the *Terminiello* case argued that his speech, made before an invited audience which had gained entrance to the meeting by presenting mailed cards of admission, was a private affair and could not have breached the public peace. In order to pass on the validity of such a claim, the courts must define the notion of a breach of the *public* peace.

The presence of a statute applicable only to breaches in a public place makes the formulation easier to reach, although even in such cases it is frequently troublesome.[7] Where the statute applies to both private and public places, a definitive test is more difficult to find. Some of the standards suggested in the cases depend on the number of people disturbed,[8] others on whether the people present were invited.[9] Most courts, however, resort to an indefinite statement that the time, place, and circumstances must be taken into consideration.[10]

All these tests are inadequate because they fail to state the offense against the public which the breach of the peace prosecution is supposed to punish. This inadequacy may be avoided by an examination of the different injuries to the public concealed by the vague generic term "breach of the peace." An example of the all-inclusive nature of the breach of peace action for the use of objectionable words is the court's finding in the *Terminiello* case that the defendant had breached the peace in five different ways: 1) The defendant called members of the audience "scum," an abusive word.[11] 2) The defendant's "opprobrious, abu-

[4] Meiklejohn, Free Speech and Its Relation to Self-government 63 (1948).

[5] Chafee, Free Speech in the United States 149 (1941).

[6] People v. Monnier, 280 N.Y. 77, 19 N.E. 2d 789 (1939) (abusive words used over a telephone held not a breach of the peace). People v. McCauliff, 267 N.Y. 581, 196 N.E. 590 (1935) (abusive words used by husband toward wife in their home held not breach of peace).

[7] State v. Weekly, 29 Ind. 206 (1867); Carwile v. State, 35 Ala. 392 (1860); Taylor v. State, 22 Ala. 15 (1853). In all these cases the courts had to define a public place to establish the crime of affray, related to breach of the peace.

[8] People v. Reid, 180 N.Y. Misc. 289, 40 N.Y.S. 2d 793 (1943).

[9] Austin v. State, 124 S.W. 636 (Tex. Crim. App., 1910).

[10] City of Chicago v. Terminiello, 332 Ill. App. 17, 74 N.E. 2d 45 (1947).

[11] City of Chicago v. Terminiello, 400 Ill. 23, 32, 79 N.E. 2d 39, 44 (1948).

sive and insulting stories . . . incited an actual breach of the peace within the auditorium."[12] 3) "[T]he defendant's conduct in scheduling an address in a large auditorium, invited a storm of protest . . . [which] resulted in innumerable acts of violence."[13] 4) "As to the majority of the audience, defendant, by his provocative and inflammatory utterances . . . instilled in them the fear of revolution, domination and murder by what he described as the criminal Jewish element in America. . . ."[14] 5) The defendant's "speech tended to incite the majority of his audience to immediate violence against the angry mob outside."[15]

Of these grounds for conviction, the first comes closest to the historical pattern of a breach of the peace action. Abusive words have been punished because they tended to provoke a fight.[16] Lewd, obscene, profane, libelous, and insulting or fighting words are punished because "their very utterance inflict injury or tend to incite an immediate breach of the peace."[17] But this statement attributes to insulting words two different objectionable qualities—such words "injure" or "tend to incite an immediate breach of the peace." The element of injury characterizes the word as an act with the effect of a blow. Yet most courts justify punishment for breach of the peace on the sole ground that abusive and offensive words tend to incite an immediate breach of the peace by causing a fight.[18]

This dichotomy is also evident in another verbal crime, criminal libel. Punishment for this crime was first justified because libelous words tended to cause a breach of the peace. In modern cases, the breach of the peace is not necessarily considered; libelous words can be punished merely because they injure the object of the libel. The threat to the public peace is no longer needed as a justification.[19]

The modern justification sometimes used in criminal libel can perhaps be understood by realizing that an injury to reputation and character is more tangible than one to feelings or peace of mind. Peace of mind is easily disturbed, and angry words are frequently used. In the breach of peace actions the courts, by emphasizing the threat to public peace presented by a fight, have been able to contain within reasonable bounds[20] the instances in which abusive words will be punished.[21]

[12] Ibid.

[13] Ibid.

[14] Ibid., at 33, 44.

[15] Ibid., at 33, 45.

[16] This is the rationale stated in Chaplinsky v. New Hamphsire, 315 U.S. 568 (1942).

[17] Ibid., at 572 quoting Chafee, op. cit. supra note 5.

[18] State v. Steger, 94 W.Va. 576, 119 S.E. 682 (1923).

[19] Burdick, Law of Crime § 785 (1946); May, Law of Crimes § 115 (Sears's and Weihofen's ed., 1938), citing 19 A.L.R. 1523 (1922).

[20] Ware v. Loveridge, 75 Mich. 488, 42 N.W. 997 (1889).

[21] It is not clear from the cases whether the threat of a fight in itself is a sufficient breach of peace or whether the threat of the fight must disturb the public represented by one or more on-

The dual basis for the punishment of offensive words explains the courts' difficulty in determining just when the public has been disturbed. Under the tendency-to-provoke-a-fight rationale, the courts seek some member of the public at large who might have been disturbed.[22] Under the injurious-nature-of-the-words-themselves approach, the abused person himself is the "public."[23]

The second and third findings of breach of the peace in the *Terminiello* case are not easily fitted into the ordinary pattern of breach of the peace prosecution. In the third example the court intimated that the defendant should not have scheduled the meeting because he knew it would provoke others to breach the peace[24]—a form of previous restraint. In the second example the court blamed the speaker for the intemperate reaction of his unfriendly listeners: a reaction not to abusive words directed at the listener, such as the word "scum," but to distorted propaganda aimed to persuade his audience.

The significant difference between conviction for using words like "scum" and conviction for the rest of the speech is illustrated in *Cantwell v. Connecticut*[25] and *Chaplinsky v. New Hampshire*.[26] In the *Cantwell* case the Catholic listeners were angered by the vilification of their religion by Cantwell, a Jehovah's Witness, and threatened to strike him. The court held that he was not guilty of common-law breach of the peace. His exaggeration and vilification were excesses of discussion and persuasion which a society interested in preserving freedom of speech had to accept. In the *Chaplinsky* case, calling a marshal a "damned Fascist" and "damned racketeer" was held to be a breach of the peace even though there was no evidence that the marshal was angered or tempted to strike Chaplinsky. The two cases dramatically point out the difference between the word as an act and the word as an idea. It is therefore desirable that the statute or ordinance be directed specifically at abusive and offensive words so that

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lookers. See Morris v. District of Columbia, 31 A. 2d 652 (Mun. Ct. App. D.C., 1943), where an insult to a single passenger by a taxicab driver was held to be disorderly conduct because it tended to cause a breach of the peace.

[22] A husband, finding his wife in a hotel room with another man, shot and killed him. The wife was held not guilty of a diversion tending to a breach of the peace. "Only the parties immediately concerned were disturbed thereby." City of Chicago v. Murray, 333 Ill. App. 233, 237, 77 N.E. 2d 452, 454 (1947).

[23] "We would be loath to hold that language which would insult a man, would not be insulting to a female, because by reason of her sex and gentler nature she would not resent it with blows." Benson v. State, 68 Ala. 513, 514 (1881).

Because a police officer is not expected to fight even when provoked, some courts, unlike the Supreme Court in the Chaplinsky case, have held that insulting an officer is not a breach of the peace. People v. Lukowsky, 94 N.Y. Misc. 500, 159 N.Y. Supp. 599 (1916); State v. Moore, 166 N.C. 371, 81 S.E. 693 (1914). Contra: Pavish v. Meyers, 129 Wash. 605, 225 Pac. 633 (1924) (insulting an officer is a breach of the peace because it tends to lessen respect for law and order). People v. Fenton, 102 N.Y. Misc. 43, 168 N.Y. Supp. 725 (1917); Elmore v. State, 15 Ga. App. 461, 83 S.E. 799. (1914).

[24] The same argument has been used to justify statutes forbidding the display of red flags. People v. Burman, 154 Mich. 150, 117 N.W. 589 (1908).

[25] 310 U.S. 296 (1940). [26] 315 U.S. 568 (1942).

courts are not tempted to label the expression of unpopular ideas "breach of the peace."

The danger to free speech in a broader statute is that an opposition group has the power to create a situation tense and threatening enough to expose the speaker to a ready-made breach of peace prosecution. Rather than provoking a prosecution against the speaker, such action demands vigorous measures against the opposition.[27] If the police are unable to manage opportunistic troublemaking, free-speech rights are meaningless.

The last two examples in the *Terminiello* case charge the speaker with instilling fears, anger, and hatred in his sympathetic listeners and with inciting them to immediate violence. The breadth of the breach of the peace action is indicated by the inclusion of incitement, generally an offense included in the criminal law of solicitations.[28] But the propriety of such inclusion should be determined by reference not only to the law of solicitations but to the closely related law of attempts.

A solicitation is the mere urging of one person by another to commit a crime. The person solicited need not be at all responsive to the solicitation. He may reject it entirely.[29] He may be the one who discloses the crime to the authorities.[30] Still the solicitation has been held criminal. There is no talk of success, no talk of how close the solicitation may have come to bringing about the crime. An attempt, however, is a progression toward a crime which falls short of consummation but is still punishable.[31] The acts of preparation must come close to success before they become criminal.[32]

If the court meant to apply the standards of the laws of solicitations and attempts, Terminiello may well be punished for a solicitation. But even though the ideas expressed may have been unpopular distortions, the speech could nevertheless have been considered of a sufficient idea-conveying nature to merit protection for its public interest. If this is so, the speech presents the problem of the protection of rights of free speech rather than the problem of punishment for criminal use of words. And the traditional control used in free speech cases is the clear and present danger test.[33]

[27] See Rebecca West's description of the pains taken by the London police to protect Fascist meetings from Communist attacks and Communist meetings from Fascist attacks. Miss West's articles also contain an informal report of a recent English case dealing with a breach of the peace prosecution for Anti-Semitic remarks. West, A Reporter at Large, 24 New Yorker, No. 24, at 24 (Aug. 7, 1948); Ibid. No. 25, at 26 (Aug. 14, 1948).

[28] The crime is generally called "solicitation" rather than "incitement" in criminal-law terminology. Perhaps the word "incitement" is better used to describe words which provoke an attack against the speaker.

[29] State v. Hampton, 210 N.C. 283, 186 S.E. 251 (1936) (the defendant was held guilty of a crime even though his solicitation to burn a neighbor's dwelling was spurned).

[30] State v. Avery, 7 Conn. 266 (1828) (the defendant wrote a letter to another man's wife soliciting her to commit adultery with him; the information seems to have been sworn to by the wife).

[31] May, Law of Crimes § 130 (Sears's and Weihofen's ed., 1938).

[32] People v. Murray, 14 Cal. 159 (1859).

[33] "[T]he 'clear and present danger' language of the Schenck case has afforded practical

Interestingly enough, the clear and present danger test had its source in the law of attempts,[34] since it was first enunciated in *Schenck v. United States*.[35] In the *Schenck* case the prosecution was for a violation of the Espionage Act of 1917. Section 3 of this Act[36] was couched in terms of attempts; it described no verbal stage of the crime. As Justice Sanford later stated in *Gitlow v. New York*,[37] the clear and present danger test was used in the *Schenck* case to determine whether the verbal acts came close enough to the acts described in the statute to be punishable.

A different situation is presented when the statute specifically makes unlawful certain verbal acts, such as inciting (soliciting) people to violent overthrow of the government. The latter type of statute fixes the level at which verbal acts are unlawful and does not permit the application of the clear and present danger test in the same manner as in the *Schenck* case. This type of statute is equivalent to the criminal law of solicitation, which punishes the mere urging to crime without reference to success. Therefore, as Justice Brandeis pointed out in *Whitney v. California*,[38] the clear and present danger test needed extension to ward off the damaging blow to freedom of speech which could be struck by a simple legislative determination that use of words under any circumstances was unlawful. To avoid this encroachment, the standard was reframed to test the validity of a statute labeling a verbal act as unlawful: If there is no clear and present danger of substantive evil presented by the use of the words, then to call such speech unlawful is unconstitutional.[39]

When, therefore, the words of solicitation appear to have public interest or idea content, the ordinary law of solicitation collides with the extended variation of the clear and present danger test. Which law shall control?[40] The answer

guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue." Bridges v. California, 314 U.S. 252, 262 (1941).

[34] "But as this court has declared . . . the test to be applied—as in the case of criminal attempts and incitements—is not remote or possible effect. There must be the clear and present danger." Brandeis, J., dissenting in Schaefer v. United States, 251 U.S. 468, 486 (1920); Riesman, Civil Liberties in a Period of Transition, 3 Pub. Policy 33, 38 (1942); Chafee, op. cit. supra note 5, at 23, 46, 47, 391.

[35] 249 U.S. 47 (1919). [36] 40 Stat. 219 (1917), 50 U.S.C.A. § 33 (1928).

[37] "[It] was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character." 268 U.S. 652, 671 (1925). The difference between the two situations has been pointed out in Dunne v. United States, 138 F. 2d 137 (C.C.A. 8th, 1943), and Commonwealth v. Lazar, 103 Pa. Super. 417 (1931).

[38] 274 U.S. 357 (1927).

[39] See Thornhill v. Alabama, 310 U.S. 88 (1940); Herndon v. Lowry, 301 U.S. 242 (1937); De Jonge v. Oregon, 299 U.S. 353 (1937).

[40] Holmes seems to have looked only to the law of attempts as the source of the clear and present danger test, overlooking the fact that there is a clash between the law of solicitation and the extended variation of the test. Gitlow v. New York, 268 U.S. 652, 673 (1925); Abrams v. United States, 250 U.S. 616, 628 (1919). Chafee follows the Holmes view. He cites Commonwealth v. Peaslee, 177 Mass. 267, 59 N.E. 55 (1901), an attempt case, as an early statement by Holmes of the clear and present danger test. Chafee, op. cit. supra note 5, at 391.

depends on the degree to which the words constitute dissemination of ideas rather than incitement to crime. The public-private criterion will determine which legal context, criminal solicitation or freedom of speech, the words will evoke.[41] The distinction is not easy to make. In the *Whitney* case Justice Brandeis attempted to differentiate between advocacy and incitement, intimating that they are far apart.[42] Advocacy of ideas is useful to society and must be safeguarded, while incitement may be punished. But in one sense all words are incitements. The choice of punishment for solicitation or protection for advocacy under the clear and present danger test will depend on how receptive the courts are to the public-interest, idea-conveying nature of the words.

The application of this analysis to breach of the peace prosecutions is important because the dormancy of the law of solicitations has prompted reliance on catch-all breach of the peace statutes. In the absence of a concerted effort by the states to codify the common law of solicitation,[43] it may be expected that a breach of the peace prosecution will be brought against a speaker who incites his listeners to violence.[44] But such a prosecution need not present any special danger to freedom of speech.[45] If the words are deserving of protection, the extended phase of the clear and present danger test can be incorporated into a breach of peace trial. If the words are exclusively words of incitement, they are a breach of the peace when uttered and will be punished accordingly. The burden is placed on the judge and jury to keep open minds, to reject the impulse to label unpopular advocacy as incitement. The burden is on the speaker to advocate rather than incite if he wishes to be protected.[46] The burden is on the law to work out reasonable methods by which incitements can be punished and advocacy protected. One step in answering all three challenges would be to break down the sweeping breach of peace ordinances into carefully phrased elements directed at particular offenses. This partial solution attacks the problem at its most accessible level by aiding the courts in the recognition of free speech situations in their proper perspective and in the application of appropriate controls.

[41] Two New York cases reveal how the judge's reaction to the words as abusive or persuasive may control the result. People v. McWilliams, 22 N.Y.S. 2d 571 (1940); People v. Downer, 6 N.Y.S. 2d 566 (1938).

[42] Whitney v. California, 274 U.S. 357 (1927).

[43] Curran, Solicitation: A Substantive Crime, 17 Minn. L. Rev. 499 (1933).

[44] People v. Most, 171 N.Y. 423, 64 N.E. 175 (1902).

[45] Thurman Arnold suggests that "the making of incendiary speeches and the publication of anti-social doctrine are more logically classified under the power to punish common law crimes than under solicitation or attempt." Arnold, Criminal Attempts—The Rise and Fall of an Abstraction, 40 Yale L. J. 53 (1930). The suggestion seems to be that such speeches are punishable as breaches of the peace.

[46] "Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state." Masses Publishing Co. v. Patten, 244 Fed. 535, 540 (D.C. N.Y., 1917).

RECENT CASES

REQUIREMENT OF LOCAL DETENTION FOR FEDERAL HABEAS CORPUS JURISDICTION

Alleging that the executive department had exceeded the deportation authority vested in the president by the Alien Enemy Act of 1798,[1] 120 German nationals, confined at Ellis Island, petitioned the District Court for the District of Columbia for writ of habeas corpus.[2] The Attorney General's motion to dismiss was granted by the district court, and the decision was affirmed by the court of appeals. The Supreme Court held, with three justices dissenting, that the presence of the detained person within the territorial district of the court which is petitioned for a writ of habeas corpus is a prerequisite of jurisdiction. *Ahrens v. Clark*.[3]

This decision was based on a narrow interpretation of the federal habeas corpus statute of 1867, which provides "[t]hat the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions . . . shall have power to grant writs of habeas corpus. . . ."[4] Justice Douglas based the short decision of the Court primarily upon what he regarded as the clear meaning of the phrase "within their respective jurisdictions" as well as upon his view of the legislative history of the statute,[5] the prevailing practice in the lower federal courts,[6] and the general policy considera-

[1] 1 Stat. 577 (1798), 50 U.S.C.A. § 21 (1928).

[2] See Ludecke v. Watkins, 335 U.S. 160 (1948) (writ of habeas corpus to review order of Attorney General held properly dismissed since the Alien Enemy Act precludes judicial review of such executive action); United States ex rel. Kessler v. Watkins, 163 F. 2d 140 (C.C.A. 2d, 1947), cert. den. 332 U.S. 838 (1947) (deportation orders for German alien enemies held not unenforceable on ground that German government had ceased to exist after unconditional surrender and that there was therefore no foreign government as to which there was a declared war); United States ex rel. Schlueter v. Watkins, 158 F. 2d 853 (C.C.A. 2d, 1946)(statute permitting removal of alien enemies upon executive action without court control held constitutional).

[3] 335 U.S. 188 (1948).

[4] 14 Stat. 385 (1867), 28 U.S.C.A. § 452 et seq. (1928).

[5] When the bill embodying the statute was introduced in the Senate, there was an objection that it would permit a "district judge in Florida to bring before him some men convicted and sentenced and held under imprisonment in Vermont or in any of the further States." Cong. Globe, 39th Cong. 2d Sess., at 730 (1867). To meet this objection, the clause "within their respective jurisdictions" was added to the statute. Ibid., at 790.

[6] McGowan v. Moody, 22 App. D.C. 148 (1903); In re Bickley, 3 Fed. Cas. 332, No. 1,387 (D.C.N.Y., 1865); cf. United States ex rel. Harrington v. Schlotfeldt, 136 F. 2d 935, 940 (C.C.A. 7th, 1943); Jones v. Biddle, 131 F. 2d 853 (C.C.A. 8th, 1942); United States ex rel. Belardi v. Day, 50 F. 2d 816 (C.C.A. 3d, 1931); Ex parte Gouyet, 175 Fed. 230 (D.C. Mont.,

tions against movement of prisoners from one district to another.[7]

Justice Rutledge controverted each of the majority's conclusions in his extensive dissent. In his view the words "within their respective jurisdictions" are ambiguous: The statute does not purport to define jurisdiction literally in terms of the locus of the body of the prisoner rather than in terms of some other factor, such as the presence of the jailer.[8] Justice Rutledge's examination of the statute's legislative history disclosed no indication that Congress had considered the issue before the Court. The phrase might well have been inserted to guard against the possibility that the broad words of the statute would permit district judges to issue process against jailers in remote districts as a departure from the usual rule that process does not run beyond the territorial jurisdiction of the issuing court.[9] Moreover, the dissenting opinion argued that the weight of authority in the lower federal courts[10] and a famous dictum by Judge Cooley,[11] cited with approval by the Court as recently as 1944,[12] were opposed to the majority's conclusion. The high cost and administrative burden entailed in transporting prisoners from one district to another could be overcome and the efficacy of the writ preserved if district courts could issue writs in behalf of prisoners detained outside the jurisdiction whenever the jailer was subject to the court's process. The district courts could then refuse to grant the writ if the jailer could persuade them that a more convenient forum was available.[13] In

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1909); In re Boles, 48 Fed. 75 (C.C.A. 8th, 1891); see Sanders v. Allen, 100 F. 2d 717 (App. D.C., 1938); Tippitt v. Wood, 140 F. 2d 689 (App. D.C., 1944). But see Ex parte Ng Quong Ming, 135 Fed. 378 (D.C.N.Y., 1905); Ex parte Fong Yim, 134 Fed. 938 (D.C.N.Y., 1905).

[7] The Court pointed to the "opportunities for escape afforded by travel, the cost of transportation, [and] the administrative burden of such an undertaking" as controlling factors. Ahrens v. Clark, 335 U.S. 188, 191 (1948).

[8] The Court had previously stated that if a statute could be construed in either of two ways, only one of which would grant power to issue writs of habeas corpus, the "great importance" of the writ might justify a construction upholding the grant. Whitney v. Dick, 202 U.S. 132, 136 (1906); Ex parte Bollman, 4 Cranch (U.S.) 75 (1807).

[9] Rule 4(f), Federal Rules of Civil Procedure, 28 U.S.C.A. foll. § 723c (1941).

[10] Sanders v. Allen, 100 F. 2d 717 (App. D.C., 1938); Ex parte Young, 50 Fed. 526 (C.C. Tenn., 1892); United States v. Davis, 25 Fed. Cas. 775, No. 14,926 (C.C.D.C., 1839); Ex parte Ng Quong Ming, 135 Fed. 378 (D.C.N.Y., 1905); Ex parte Fong Yim, 134 Fed. 938 (D.C.N.Y., 1905).

[11] In re Jackson, 15 Mich. 416, 439 (1867): "The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. . . . The place of confinement is, therefore, not important to the relief, if the guilty party is within reach of process, so that by the power of the court he can be compelled to release his grasp. The difficulty of affording redress is not increased by the confinement being beyond the limits of the state, except as greater distance may affect it."

[12] Ex parte Mitsuye Endo, 323 U.S. 283, 306 (1944).

[13] See Ahrens v. Clark, 335 U.S. 188, 207 (1948); Beard v. Bennett, 114 F. 2d 578, 580 (App. D.C., 1940). The federal courts frequently decline jurisdiction in habeas corpus proceedings on the ground that the petitioner should exhaust his remedies in the state courts first. Ex parte Hawk, 321 U.S. 114 (1944); Gusman v. Marrero, 180 U.S. 81 (1901); Minnesota v. Brundage, 180 U.S. 499 (1901); A Study of the Illinois Supreme Court, 15 Univ. Chi. L. Rev. 107, 120 et seq. (1947).

the majority's denial of this power to the district courts, Justice Rutledge found a grave impairment of the availability of the writ and a serious infringement of civil liberties.

A 1944 Supreme Court decision, *Ex parte Mitsuye Endo*,[14] was a recognized obstacle in the path of the majority opinion in *Ahrens v. Clark*. In the *Endo* case, after the petitioner had been denied a writ of habeas corpus by the district court, and while her appeal to the circuit court was pending, she was removed from the district. The Court, expressly reserving judgment on the jurisdictional problem[15] decided later in *Ahrens v. Clark*, stated that jurisdiction of the district courts could not be defeated by removal of the petitioner:[16]

> There are expressions in some of the cases which indicate that the place of confinement must be within the court's territorial jurisdiction in order to enable it to issue the writ. . . . But we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner.[17]

If it is power over the jailer that is essential in habeas corpus proceedings, and if physical power is of the essence of jurisdiction,[18] consistency would require a different result in the *Ahrens* case. If it is the court's power over the place of confinement that is essential, as indicated by the *Ahrens* decision, then different language should have been used in *Ex parte Mitsuye Endo*.

The dilemma presented by the language of the two opinions could have been avoided if the Court had decided whether the Attorney General was the proper respondent in proceedings carried out by officials of the department of immigration under a statute delegating authority to the president. The habeas corpus statute furnishes no solution, providing merely: "The writ shall be directed to the person in whose custody the party is detained."[19] If the Court's sole intention was to require that the petition be brought in the district court having jurisdiction over the place of confinement, the Court could have asserted that a responsible official at the situs of detention was the proper respondent. The need to resort to dubious statutory construction would thus have been obviated. Although some authority supports the "situs of detention" view,[20] the problem of defining "the person in whose custody the party is detained" has received

[14] 323 U.S. 283 (1944).

[15] Ibid., at 305.

[16] But see the cases holding the court to be without jurisdiction where service is made upon the respondent after removal of the petitioner: United States ex rel. Goodman v. Roberts, 152 F. 2d 841 (C.C.A. 2d, 1946), cert. den. 328 U.S. 873 (1946); United States ex rel. Lee Fook Chew v. McNeil, 69 F. 2d 107 (C.C.A. 3d, 1934) (petitioner did not appeal denial of writ until after removal); Ex parte Yee Hick Ho, 33 F. 2d 360 (D.C. Cal., 1929).

[17] 323 U.S. 283, 306 (1944).

[18] McDonald v. Mabee, 243 U.S. 90, 91 (1917).

[19] 14 Stat. 385 (1867), 28 U.S.C.A. § 455 (1928). The wording is only slightly changed in the revised judicial code, 28 U.S.C. § 2243 (1948).

[20] See Sanders v. Bennett, 148 F. 2d 19 (App. D.C., 1945) (warden should have been named rather than official who supervises warden); Jones v. Biddle, 131 F. 2d 853 (C.C.A. 8th, 1942) (warden should have been named as custodian of federal prisoner at Leavenworth rather than Attorney General); McGowan v. Moody, 22 App. D.C. 148 (1903) (Secretary of Navy was not custodian of a marine imprisoned on Guam).

little attention from the courts. The Attorney General, seeking to waive the issue as to the territorial limitation, argued that naming the appropriate official is a mere formality.[21] But it is not surprising in light of the lack of discussion of this issue that some of the German deportees on Ellis Island sought relief in the District Court for the Southern District of New York by service on the district director of immigration,[22] while others sought a remedy in the District of Columbia by service on the Attorney General.

Refusal to adopt the solution that the custodian is necessarily an official at the situs of detention has presented the courts with a number of different jurisdictional variables in habeas corpus proceedings. Before the *Ahrens* decision, courts discussing the situation in which the prisoner was detained in a district of state X and the jailer was in a district of state Y had expressed divergent views as to the jurisdiction of a federal court in Y.[23] Where the prisoner and jailer are both in a district of state X and the petition is filed in a district of state Y, the cases have been unanimous in holding that there is a lack of jurisdiction.[24] If the prisoner is in a district of state X, the jailer in a district of state Y, and the petition is filed in X, the court of X lacks jurisdiction.[25] With respect to another situation, that of Americans imprisoned in foreign territory occupied by American military forces, the majority opinion in the *Ahrens* case reserved judgment. In such a situation no district court would have jurisdiction if it

[21] Ahrens v. Clark, 335 U.S. 188, 200 n. 11 (1948).

[22] See cases cited note 2 supra.

[23] Opinions holding that jurisdiction existed in these circumstances included Sanders v. Allen, 100 F. 2d 717 (App. D.C., 1938); Ex parte Young, 50 Fed. 526 (C.C. Tenn., 1892); United States v. Davis, 25 Fed. Cas. 775, No. 14,926 (C.C.D.C., 1839); Ex parte Ng Quong Ming, 135 Fed. 378 (D.C.N.Y., 1905); Ex parte Fong Yim, 134 Fed. 938 (D.C.N.Y., 1905).

The contrary rule that jurisdiction is lacking unless the place of confinement is within the court's territorial jurisdiction was asserted in In re Bickley, 3 Fed. Cas. 332, No. 1,387 (D.C. N.Y., 1865) (the custodian did not attempt to waive the defect); United States ex rel. Quinn v. Hunter, 162 F. 2d 644 (C.C.A. 7th, 1947) (although both the custodian and prisoner were within the territorial jurisdiction, the warden was present only as a witness in a proceeding to correct the judgment of conviction of the prisoner, and the prisoner was in a marshal's custody for purposes of the proceeding, subject to return to the jurisdiction of confinement as soon as the proceedings were terminated). In cases cited note 24 infra, the assertion of the place of confinement rule was only dictum, since the prisoner and jailer were both outside the jurisdiction. The same is true of the cases cited notes 20 and 16 supra, the actual holdings of those cases being based either on the naming of the wrong respondent or on the fact that the respondents no longer had custody of the petitioners; see also Dorsey v. Gill, 148 F. 2d 857 (App. D.C., 1945); Bowen v. Johnson, 55 F. Supp. 340 (Cal., 1944).

[24] United States ex rel. Harrington v. Schlotfeldt, 136 F. 2d 935 (C.C.A. 7th, 1943); In re Boles, 48 Fed. 75 (C.C.A. 8th, 1891); United States ex rel. Corsetti v. Commanding Officer, 3 F.R.D. 360 (N.Y., 1944); Hauck v. Hiatt, 50 F. Supp. 534 (S.C., 1943); Ex parte Gouyet, 175 Fed. 230 (D.C. Mont., 1909).

[25] Rule 4(f), Federal Rules of Civil Procedure, 28 U.S.C.A. foll. § 723c (1941); see United States ex rel. Quinn v. Hunter, 162 F. 2d 644 (C.C.A. 7th, 1947) (court cannot properly direct its process to warden while warden is outside its territorial jurisdiction). But see Ex parte Farley, 40 Fed. 66, 68 (C.C. Ark., 1889): "The court may grant this great 'writ of right' in every case where a party is restrained of his liberty anywhere in the territorial jurisdiction of the court. . . ."

were determined that the custodian is the actual turnkey or the highest military official in the area of confinement.[26] Yet if the Secretary of Defense or the President is to be regarded as the custodian, then it appears that the *Ahrens* decision denies jurisdiction to the District Court for the District of Columbia because the petitioner is not confined within that district. The Supreme Court has ruled that it does not have original jurisdiction in the circumstances,[27] thus depriving a group of American citizens of the right of habeas corpus unless the individual justices are willing to accept jurisdiction.[28] The resulting deluge of habeas corpus petitions upon each of the Supreme Court justices would be an undesirable result of their acceptance of original jurisdiction.

Because *Ahrens v. Clark* was treated by the court as a simple instance of application for the writ of habeas corpus to the wrong court, a series of far reaching civil liberties problems have been created.[29] Perhaps no habeas corpus remedy now exists for some persons detained in deportation proceedings, incarcerated in an institution for the insane, or held by the military either under the Selective Service Act[30] or pursuant to court-martial proceedings. In many such instances the prisoner is in one district, the jailer in another. The same problem may also arise in habeas corpus petitions by a parent seeking to regain custody of a child. By statutory revision of the judicial code, a remedy has been granted for persons committed pursuant to judicial process in contrast to those detained by executive or private action: Persons in the former category are required to seek their remedy in the court of conviction.[31] Hence, a jurisdictional snarl created in the District of Columbia by *Ahrens v. Clark* has been avoided for future petitioners. The penal institutions and asylums for the nation's capital are located in Virginia, although the custodians are subject to the process of the District of Columbia courts.[32] Hitherto prisoners and inmates have applied to

[26] Cases cited note 24 supra.

[27] Ex parte Betz, Ex parte Durant, Ex parte Wills, Ex parte Cutino, Ex parte Walczak, Ex parte McKinley, Ex parte Murphy, all reported at 329 U.S. 672 (1946). Justices Rutledge and Black were of the opinion that the Court's declining of application for relief by habeas corpus should be without prejudice to filing in the appropriate district court. The question may be asked: What district court is appropriate? Justice Murphy thought the petitions raised questions of jurisdiction and procedure which the Court should determine. Presumably, however, the Supreme Court does not have original jurisdiction because Congress cannot enlarge the original jurisdiction of the Court beyond the cases specified in Article III of the Constitution. B.&O. Ry. Co. v. ICC, 215 U.S. 216 (1909).

[28] A Supreme Court justice may decline to entertain an application for a writ of habeas corpus and may transfer it to the district court having jurisdiction to entertain it. 28 U.S.C. § 2242(b) (1948). The application cannot be transferred "to the district court having jurisdiction to entertain it" if there is no district court with such power. But it may be doubted that the "respective jurisdiction" of a justice extends beyond the limits of the United States.

[29] See Frank, United States Supreme Court: 1947–48, 16 Univ. Chi. L. Rev. 1, 33 (1948) (classifying Ahrens v. Clark as a civil rights case).

[30] 54 Stat. 885 (1940), as amended, 50 U.S.C A. §§ 301–18 (1944).

[31] 28 U.S.C. § 2255 (1948).

[32] This would be true even if they lived in Washington's suburbs in Virginia or Maryland, since each is "in every real sense a member of the District of Columbia community." Langan v. Langan, 150 F. 2d 979, 980 (App. D.C., 1945).

the District of Columbia courts for release.[33] *Ahrens v. Clark* standing alone would have deprived these petitioners of effective habeas corpus relief.[34]

The restrictions on the "freedom writ" introduced by *Ahrens v. Clark* can best be overcome by statute. For the protection of Americans imprisoned abroad by American military personnel, an act has been proposed which stipulates that the Chief Justice of the Supreme Court shall assign to designated district courts the duty of passing on the merits of habeas corpus petitions presented by citizens who are not within the territorial jurisdiction of any federal district court.[35] The Attorney General is to be named respondent in all such proceedings. A similar statute, providing that district courts shall have the power to issue writs if the jailer is subject to process,[36] would seem necessary for effective preservation of one of the most "precious safeguard[s] of personal liberty."[37] One year after the passage of the statute which the *Ahrens* decision has construed restrictively, the Supreme Court said: "[T]he general spirit and genius of our institutions have tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States."[38] The reversal of this trend is not a desirable tendency.

MUTUAL AGREEMENT NOT TO COMPETE AS PRECLUDING RELIEF FOR PATENT INFRINGEMENT

The Kammerer Corporation, holder of a pipe-cutter patent, and its exclusive licensee, Baash-Ross Tool Co., sought damages and an accounting from the defendant, McCullough, for infringement. After the patent was found to be valid and infringed,[1] the defendant raised the defense that the licensing agreement

[33] Burns v. Welch, 159 F. 2d 29 (App. D.C., 1947); Sanders v. Allen, 100 F. 2d 717 (App. D.C., 1938).

[34] In McAffee v. Clemmer (App. D.C., Oct. 18, 1948), the court of appeals relied on Ahrens v. Clark to hold that the District Court of the District of Columbia was without jurisdiction to grant a writ of habeas corpus to a petitioner who had been sentenced by that court and confined in the District of Columbia Reformatory at Lorton, Virginia. The court noted that this decision overruled previous precedents in the same court to the contrary, but made no mention of the section in the new judicial code, 28 U.S.C. § 2255 (1948), which permits the prisoner to make a motion to the court of his conviction at any time "to vacate, set aside or correct the sentence." Another circuit, confronted with the same problem, held that a prisoner, who was sentenced by a federal district court in North Carolina and confined in Georgia, might not seek a writ of habeas corpus in the North Carolina district court. Crowe v. United States, 169 F. 2d 1022 (C.C.A. 4th, 1948).

[35] Wolfson, Americans Abroad and Habeas Corpus, 9 Fed. Bar J. 142 (1948).

[36] Of course, the statute ought to be phrased permissively so that the courts could deny jurisdiction by invoking the doctrine of forum non conveniens. See Rutledge, J., dissenting in Ahrens v. Clark, 335 U.S. 188, 207 (1948).

[37] Bowen v. Johnston, 306 U.S. 19, 26 (1939).

[38] Ex parte Yerges, 8 Wall. (U.S.) 85, 101 (1868).

[1] Kammerer Corp. v. McCullough, 39 F. Supp. 213 (Calif., 1941), aff'd 138 F. 2d 482 (C.C.A. 9th, 1943), cert. den. 322 U.S. 739 (1944), rehearing granted 322 U.S. 766 (1944), writ dismissed and case remanded 323 U.S. 327 (1945).

between the plaintiffs went beyond the patent monopoly and restrained competition. The licensor had covenanted not to do business either with the devices covered by the agreement or with competing devices. The licensee had agreed not to deal with competing devices. The majority opinion held that this covenant extended the patent monopoly and harmed the public by preventing competition with other patents which might otherwise be marketed by the plaintiffs. Enforcement of the infringement decree was refused. The dissent denied any issue of public interest and claimed that the evidence entirely failed to establish any way in which the patentee's business practices stifled competitive forces. *McCullough v. Kammerer Corp.*[2]

The issues and decision in this case mark another step in spelling out one of the most important and controversial aspects of patent law: What constitutes an extension of the patent monopoly, and, if one is found, how should the patentee be punished or his rights restrained?

The Supreme Court in an early case decided that the object of the patent laws was not primarily the creation of private fortunes but the promotion of progress of science and the useful arts.[3] It is true that the Court has repeatedly sustained the doctrine that the patentee may make no use of his patent if he so pleases,[4] whether such non-use is reasonable or not.[5] But it has increasingly restricted the commercial marketing techniques of the patentee to practices compatible with the Court's notions of competitive policy. This policy has reflected changing contract and property concepts[6] and has shown especially the impact of more recent economic thinking—the recoil from economic concentration and restraint of competition—which has been influenced in great part by the passage of the anti-trust laws.[7]

[2] 166 F. 2d 759 (C.C.A. 9th, 1948).

[3] Pennock v. Dialogue, 2 Pet. (U.S.) 1, 19 (1829); Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 511 (1917).

[4] Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405 (1908); Special Equipment Co. v. Coe, 324 U.S. 370 (1945). Noteworthy is the dissent of Douglas, J., in which he exclaimed that it was time to overrule the Paper Bag case and rid the law of a rule that "is inconsistent with the Constitution and the patent legislation which Congress has enacted." Ibid., at 381.

[5] The Court in Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405 (1908), rejected the lower court's distinction between "simple non-use" and "unreasonable non-use," saying that the suppression for the maintenance of old and less efficient machines was probably reasonable.

[6] See Hamilton, Patents and Free Enterprise 51–85 (U.S. TNEC Monograph 31, 1941).

[7] The effect of the anti-trust statutes upon patent law is illustrated by many cases: Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917), and the United Shoe cases, United States v. United Shoe Mach. Corp., 247 U.S. 32 (1918), and United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922). Consider also the problem of whether there is a conflict in policy between the patent and the anti-trust laws. For a view holding that there is no conflict, see Wood, Patents and Antitrust Law (1942), and Barnett, Patent Property and the Anti-monopoly Laws (1943). Contra: see the dissent of Rutledge, J., in Hartford-Empire Co. v. United States, 323 U.S. 386, 452 (1946). In general, see Oppenheim, Cases on Federal Anti-trust Laws 482 (1948).

Control and punishment of the patentee has come, of course, through government suit under the anti-trust laws.[8] Of perhaps equal importance has been the refusal of the courts to enforce the patentee's rights of equitable relief against direct or contributory infringers if the patentee has used his exclusive powers under the patent laws to extend his patent monopoly over some normally competitive aspect of the market. The *McCullough* case raises the question of what practices the courts consider sufficiently nefarious to warrant a denial of equitable relief. Any attempt to answer this question must also consider the anti-trust cases as an indication of the trend of the courts' thinking.

In denying relief against infringers, the Supreme Court has indicated two lines of defense against the patentee. The defense most often invoked relies on a showing that there has been a misuse of the patent such as to give the patentee a limited monopoly over some other patented or unpatented article not within the patent grant. This line, which has been developed principally where there has been a tie-in arrangement between the patented article and something else, clearly does not require proof of a violation of the anti-trust laws. Then, in *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.*,[9] the Court first indicated that the anti-trust laws and not the patent law might be used to decide whether the patentee's conduct constituted a complete defense for the infringer.

It is in interpreting these approaches that the *McCullough* court split. The majority opinion contended that the covenant involved was an extension of the patent monopoly sufficient to justify a denial of relief. The dissent represents the position that before the patentee may be denied relief it must be shown that his actual practices—in effect measured by the standards of the anti-trust laws—illegally affected competition.

The misuse doctrine has been given broad application by the Supreme Court within the last three decades. In 1912 the Court's decision in *Henry v. A. B. Dick Co.*[10] reaffirmed the theory that marked the high-tide of patent control: Since the patentee might withhold his patent altogether from public use, he might also impose any condition he chose upon the use of the patented article. In the *Dick* case the Court upheld the patentee's right to condition his sale of the patented article upon the purchaser's agreement to buy accessory materials exclusively from the patentee. But after the Clayton Act had specifically outlawed the use of contracts tying together the lease or sale of the patented article and patented or unpatented supplies, the Supreme Court overruled the *Dick* case. In *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*[11] the Court carefully pointed out that such contracts were unlawful independent of the Act as an extension of the patent monopoly. The decisions of the Court following the *Motion Picture* case have consistently refused to aid patentees where

[8] Sherman Anti-trust Act, 26 Stat. 209 (1890) as amended, 15 U.S.C.A. §§ 1–7 (1941); Clayton Anti-trust Act, 38 Stat. 730 (1914), 15 U.S.C.A. § 12 et seq. (1941); Federal Trade Commission Act, 38 Stat. 717 (1914) as amended, 15 U.S.C.A. § 41 et seq. (1941).

[9] 320 U.S. 680 (1944). [10] 224 U.S. 1 (1912). [11] 243 U.S. 502 (1917).

there was an attempt to tie in the patented article with something outside of the patent grant.[12]

The majority in the *McCullough* case used this concept of illegal extension of patent monopoly to condemn the licensing agreement between the patentee and the sole licensee. By the terms of the agreement the patentee agreed not to "manufacture, sell, rent, license, use or in any way do business with the device or devices covered by this agreement or with devices which will come or be in competition with the device or devices covered by this agreement."[13] The licensee agreed "not to manufacture or use or rent any device which will be in competition with the device or devices covered by this license agreement."[14] Although such a covenant does not at first glance seem to constitute the same type of patent extension as a tie-in between the patented article and some tangible and existing device, article, or supply, the majority thought it came within the same principles.[15] The covenant here, instead of requiring the use of some other product supplied by the patentee or prohibiting the use of some other product if supplied by a competitor, sweepingly prohibits the use of all other devices in competition with the Kammerer patent, in what might loosely be termed a negative or reverse tie-in. In considering conventional tie-in arrangements the Supreme Court has repeated the broad statement, perhaps applicable here, that "[i]n construing and applying the patent laws as to give effect to the public policy which limits the granted monopoly strictly to the terms of the statutory grant . . . the particular form or method by which the monopoly is sought to be extended is immaterial."[16]

The federal courts have in earlier cases condemned similar restrictions upon the freedom to compete. In *Blount Manufacturing Co. v. Yale & Towne Manufacturing Co.* the Massachusetts Circuit Court announced that "a contract whereby the manufacturers of two independent patented inventions agree not to compete in the same commercial field deprives the public of the benefits of

[12] Carbice Corp. v. American Patents Development Corp., 283 U.S. 27 (1931); International Business Machines Corp. v. United States, 298 U.S. 131 (1936); Leitch Mfg. Co. v. Barber Co., 302 U.S. 458 (1938); United States v. Univis Lens Co., 316 U.S. 241 (1942); Morton Salt Co. v. Suppiger, 314 U.S. 488 (1942); B. B. Chemical Co. v. Ellis, 314 U.S. 495 (1942); Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944). But see Transparent-Wrap Mach. Corp. v. Stokes & Smith Co., 329 U.S. 637 (1947). In general, see James, Use of Patents to Control Unpatented Material, 28 J. Pat. Off. Soc. 427 (1946); Bateman, Should Anti-trust Law Penalties or Unenforceability of the Patent Monopoly Be Invoked for Misuse of the Patent Grant? 29 J. Pat. Off. Soc. 16 (1947).

[13] McCullough v. Kammerer Corp., 166 F. 2d 759, 760 (C.C.A. 9th, 1948).

[14] Ibid.

[15] The court said: "We agree with [the circuit deciding the Lockwasher case] that there is no difference in principle between extending the monopoly of the patent by suppressing the manufacture or use of competitive devices, patented or unpatented, and the extension of the monopoly by prohibiting the use in making the patented article of unpatented articles competing with those made by the licensor's subsidiary, held against the public interest in Morton Salt Co. v. Suppiger Co., 314 U.S. 488, 493 . . . ." Ibid., at 761.

[16] United States v. Univis Lens Co., 316 U.S. 241, 251–52 (1942).

competition, and creates a restraint of trade. . . ."[17] And in *Pope Manufacturing Co. v. Gormully*,[18] long before the *Motion Picture Patents* case, the Supreme Court declared a contract unenforceable at equity, even though not void as to public policy, where the licensee had agreed not to import, manufacture, or sell devices covered by other of the plaintiff's patents.

The case principally relied upon by the majority in the *McCullough* decision was *National Lockwasher Co. v. G. K. Garrett Co.*,[19] which presented a very similar fact situation. There five licensees agreed, in exchange for the right to manufacture a certain patented spring washer, not to manufacture any competing spring washers. On the basis of the same general policy decisions relied on by the *McCullough* majority concerning extension of patent monopoly as expressed by the Supreme Court, the circuit court held that

> . . . the instant case . . . falls within the principle of the cases cited to the extent that the patentee is using the lawful monopoly granted by the patent as a means of suppressing the manufacture and sale of competing unpatented articles. It is not creating for itself a monopoly for unpatented goods, as in some of the cases cited. But it is attempting by means other than that of free competition to extend the bounds of its lawful monopoly to make, use and vend the patented device to the extent where such device would be the only one available to a user of such an article. This monopoly is obviously not covered by the patent. A patentee's right does not extend to the use of the patent to purge the market of competing non-patented goods except, of course, through the process of fair competition.[20]

In the *Lockwasher* case it appears that all five manufacturers gave up the production of other washers upon entering the agreement.[21] In the *McCullough* case two employees of the licensee Baash had devised the patented pipe cutter as an improvement upon one already patented and used by Kammerer. To avoid a conflict of patent rights and to make manufacture possible, Kammerer and the two Baash employees formed the Kammerer Corporation to hold the new patent. The Baash Company was given the exclusive license rights under the agreement already set forth. Between the time of the contract, 1923, and the bringing of the instant suit, the plaintiffs established a monopoly of the pipe-cutting business in the United States and did business in foreign countries as well.

The majority claimed restraint of competition at three points. The first, an issue not raised by the *Lockwasher* case, was that the officers and employees of the licensor, Kammerer Corporation, were restrained from creating new devices

[17] 166 Fed. 555, 557 (C.C. Mass., 1909); cf. Jones Cold Store Door Co. v. Jones, 108 Md. 43, 70 Atl. 88 (1908), where a contract restraining the assignor of a patent from dealing with similar devices for a period of five years was held void; National Harrow Co. v. Hench, 76 Fed. 667 (C.C. Pa., 1896), where a combination requiring manufacturers to assign their patents to the corporation set up for that purpose and to take back a license for the manufacture of their patented harrow, all parties being bound to sell at a uniform price, was held in restraint of trade.

[18] 144 U.S. 224 (1892).

[19] 137 F. 2d 255 (C.C.A. 3d, 1943).

[20] Ibid., at 256.

[21] See note 31 infra.

to compete with the plaintiffs' present patent. There seems little doubt that under the covenant the licensee could prevent the licensor from making or from licensing others to make a pipe-cutting device employing an entirely new invention. But with respect to improvement patents, the majority's contention does not seem accurate. The first paragraph of the covenant provided that the license right was to extend to patents "now granted or which may hereafter be granted on any applications now pending or any patents hereafter obtained on improvements . . . said license to continue for the full term of any Letters Patent granted for said inventions or improvements thereon."[22]

More important are the conclusions of the *McCullough* majority opinion that the covenant restrained competition at two other points: It served to "extend the monopoly of the patent by preventing competition with the patent of any other pipe cutter, patented or unpatented, manufactured, used or sold by the licensee, theretofore engaged in making pipe cutting tools,"[23] and it prevented the licensor from dealing either with the patented article or with any competing device.

Considering the position of the licensor first, the dissent argued that the Kammerer Corporation was a " 'paper corporation' expressly created for the one and only purpose of holding the Kammerer patent or patents . . . ; it was not, and never was, a manufacturing and/or selling company."[24] It had "never competed, or attempted to compete with any one."[25] While this may be true, the license restriction would seem to come within the doctrine of *Blount Manufacturing Co. v. Yale & Towne Manufacturing Co.*,[26] where it was held improper for a patentee to put into the hands of another the power to restrain the patentee from developing his own patents. And even if the circuit in which the court here sat did not expressly adopt the *Blount* view, it seems obvious, as the majority points out, that the covenant restriction did aim at the prevention of such competition, looking forward to the day when the so-called "paper corporation" might itself desire to manufacture a third party's device or license others to do so. This restriction upon the licensor, not present in the *Lockwasher* situation, adds to the dissenting judge's difficulty in distinguishing the result of that case.

It is with respect to the restriction upon the licensee, however, that the break between the majority and dissent becomes more pronounced. Dissenting Judge Bone read the *Lockwasher* decision as clearly demonstrating a combination of six manufacturers "all coldly bent upon the creation of a stifling monopoly in an entire field which (under facts disclosed at trial) *was deliberately fashioned and designed to purge the entire market of competition*,"[27] while no design was

[22] Appellant's supplemental brief at 7.

[23] McCullough v. Kammerer Corp., 166 F. 2d 759, 760 (C.C.A. 9th, 1948).

[24] Ibid., at 768. [25] Ibid.

[26] 166 Fed. 555 (C.C. Mass., 1909).

[27] McCullough v. Kammerer Corp., 166 F. 2d 759, 771 (C.C.A. 9th, 1948).

shown in the instant case to eliminate all or any competition. The report of the *Lockwasher* case does not disclose the nature of the schemes indulged in by the patentee, partly because the court did not get a full report from the master below.[28] The decision rests upon the master's finding that the plaintiff had a restrictive licensing policy in operation and upon certain uncontroverted evidence not disclosed in the opinion. Apparently, then, the contract policy of refusing to allow the licensees to manufacture competing devices really lay at the roots of the decision. After stating the form of the covenant, the court concluded:

> We think this is enough; enough to show that the plaintiff was using its patent to suppress competition with it by non-patented articles. To the extent that the policy was successful the supply of competing non-patented washers would, of course, disappear.[29]

To the same extent the supply of competing pipe cutters would disappear from the market in the *McCullough* situation, and the record permits the inference that this was in fact the result. The contract was entered into in 1923. From that time on the plaintiffs experienced great success. In the course of years prior to the instant suit, the device had gained a monopoly of the pipe-cutting business, "all other cutters being supplanted by the cutter of which [the patentee] had the patent monopoly."[30] With the licensor and licensee both bound by a covenant that aimed at control of the market, it is doubtful that all of the success emanated from the superiority of the cutter.

One fact does appear, however, that brings the *McCullough* decision squarely within the *Lockwasher* holding. In both cases existing manufacturers[31] gave up the production of competitive articles to obtain licenses under the restrictive covenants. To the extent that this withdrew competition from the market, it may be said that the covenants were an illegal extension of the patent monopoly. And though there is no showing in the *Lockwasher* case of the extent to which the plaintiff and licensees controlled the market,[32] the amount of control exercised by the plaintiffs in the instant case underscores the probable effect of the

[28] The court said: "[W]e are confronted with a record which is not complete in detail. The special master made one specific finding on the matter of the defendant's contractual policy. The District Judge regarded the point under discussion as outside the reference to the master. However that may be, it is not outside the scope of relevancy for us if we have the necessary facts on which a conclusion may be based." National Lockwasher Co. v. G. K. Garrett Co., 137 F. 2d 255, 257 (C.C.A. 3d, 1943).

[29] Ibid., at 257.

[30] McCullough v. Kammerer Corp., 166 F. 2d 759, 761 (C.C.A. 9th, 1948).

[31] The McCullough court states definitely that the licensee was an existing manufacturer; the Lockwasher court speaks of "[t]he patentee issu[ing] licenses to various manufacturers of metal washers under a standard form of license agreement. . . . That contract contains a clause that '(g) Licensee agrees that, while this agreement is in force, it will make and sell no form of non-entangling spring washers except such as are covered by said patent, and that it will not, either directly or indirectly, make or sell spring washers of the kind specifically excluded from this license under the provisions of Paragraph-First (a) hereof.'" National Lockwasher Co. v. G. K. Garrett Co., 137 F. 2d 255, 256–57 (C.C.A. 3d, 1943).

[32] The court said, "It is not disputed that there are other forms of unpatented nontangling spring washers than those involved in the Loutrel patent." Ibid., at 256.

contractual withdrawal of the licensee from the production of more than the one type of pipe cutter. The fact that there was only one licensee in the instant case and five in the *Lockwasher* case is hardly a distinguishing factor when the monopoly position of the single licensee in the *McCullough* case is taken into consideration.

But the problem of the *McCullough* case is not confined to the misuse doctrine. So far as the instant case fails to point out specifically how actual business practice stifled competition with other devices, it must be taken to stand for the additional proposition that the agreement not to compete was itself an illegal extension of the patent monopoly sufficient to justify the refusal of relief. A number of recent Supreme Court cases support the view that any extension of the patent monopoly, whether within the anti-trust laws or not, is a sufficient defense for an infringer.

In *Morton Salt Co. v. Suppiger*[33] the circuit court had reversed the trial court upon the ground that the defendant-infringer had failed to show that the plaintiff-patentee's leases substantially lessened competition or tended to create a monopoly within the meaning of Section 3 of the Clayton Act. The tie-in contract involved an inconsequential amount of the total volume of all salt business. The Supreme Court overruled the circuit court, holding that a finding under the Clayton Act need not be made and concluding that the practice shown was a sufficient extension of the patent monopoly for Equity to "rightly withhold its assistance."[34] This result was reached despite the fact that the defendant was a direct infringer and had been in no way harmed by the tie-in-contract policy of the plaintiff. From this decision it is clear that the controlling criterion is not the actual amount of competition restrained but the fact that the patentee was engaging in a practice which restricted commerce and was not within his patent grant. "The Court . . . rejects altogether the idea of measuring the reasonableness of the restraint imposed."[35] Once it is conceded that there is no real difference in intent between the tie-in cases and agreements not to deal in competing devices, the *McCullough* case comes squarely within the *Morton Salt* decision.

More recently, in *International Salt Co., Inc. v. United States*,[36] the Supreme Court condemned tying restrictions similar to those in the *Morton Salt* case, holding that under the admitted facts no real issue remained under either the Sherman or the Clayton Act. "Not only is price fixing unreasonable, *per se*, . . . but also it is unreasonable, *per se*, to foreclose competitors from any substantial market. . . ."[37] The tie-in contract in the *International Salt* case covered and

[33] 314 U.S. 488 (1942).

[34] Ibid., at 493.

[35] Wood, Patents and Antitrust Law 86 (1942).

[36] 332 U.S. 392 (1947).

[37] Ibid., at 396. It is interesting to note that the Supreme Court in United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948), cited the International Salt case as supporting the proposition that "where a complaint charges that the defendants . . . have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal *per se*." See Tying Restrictions: Changing Standards of Legality, 48 Col. L. Rev. 733 (1948).

protected a "substantial market" just as the agreement not to compete covered and protected the monopolistic market of the plaintiffs in the *McCullough* case.

Finally, the challenging statement of Justice Douglas in *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.*[38] that "[t]he legality of any attempt to bring unpatented goods within the protection of the patent is measured by the anti-trust laws and not by the patent law"[39] should be mentioned. While it will take a proper case to determine whether this view will ultimately be carried to the point where all extensions of the patent monopoly are illegal per se under the anti-trust laws, the language employed at least suggests that the Supreme Court has developed strict notions of the treatment to be accorded any attempt at extending the patent monopoly. Certainly it is hard to doubt that such an obvious attempt to restrain competition as the covenant in the *McCullough* case would escape the policy clearly expressed in the *Morton Salt* and other recent cases.

The *McCullough* decision must be regarded as a desirable and positive step toward protection of competition. If the court had required the infringer to build a defense showing actual violations of the anti-trust laws arising from the twenty-five-year old restrictive agreement, the prohibitive nature of the task would almost certainly have precluded the denial of equitable relief to the patentee. The court is justified in saying, "We won't inquire into actual practices." To this extent the court is protecting competitive society from the operation of these covenants.

It is true that the plaintiffs are left free to practice the usual patent safeguards of buying up and shelving competitive patents, of shelving improvement patents of their own, and of requiring in the licensing agreement the assignment of all improvement patents.[40] But legally, at least, both the licensor and licensee may now deal with inventors of better pipe cutters, thus giving the public the benefit of new products offered by the largest producers in the market.

There were available to the licensor and licensee in the *McCullough* case contractual arrangements which would not seriously threaten competition.[41] Once changes were made so as to "purge" the parties of the charge of patent misuse, the patentee would be free to punish the infringer McCullough or any other infringers.[42] The total effect of these changes upon the patentee would not be to

[38] 320 U.S. 680 (1944). [39] Ibid., at 684.

[40] Transparent-Wrap Machine Corp. v. Stokes & Smith Co., 329 U.S. 637 (1947).

[41] The covenant against competition would have to be dropped. The patentee could require the assignment of improvement patents. Covenants giving the licensee an exclusive license for the life of the patent and improvement patents, together with a covenant by the patentee and licensee to share any profits made from dealing with a competing device, would give the parties some mutual protection. Or an agreement containing elements of mutual undertaking and responsibility and loss such as to make the agreement a true joint venture—which was not found here—might eliminate entirely the need for such agreements against competitive devices.

[42] It is well settled that once the patentee has shown a change in practices satisfactory to the court the patentee will be allowed to proceed against the infringer. B. B. Chemical Co. v. Ellis,

damage his competitive position in the market—if, as the dissent claimed, his monopolistic position came from the superiority of the device. But that part of the patentee's advantageous market position which is traceable to the covenant has been removed and competition restored.

DISQUALIFICATION OF FEDERAL JUDGES FOR PERSONAL BIAS

Following an appearance before the House Committee on Un-American Activities, Lester Cole, a motion picture script writer, was suspended by his employer, Loew's, Incorporated, on the ground that his conduct before the committee had violated his contract of employment. He brought a suit to restrain the suspension and to obtain damages. Invoking the disqualification provisions of Section 21 of the Federal Judicial Code,[1] the defendants filed an application to transfer the cause supported by an affidavit that the district judge assigned to the case, Leon R. Yankwich, had a personal bias against them and in favor of the plaintiff. The affidavit stated that during a discussion at the home of friends about the hearings before the House committee Judge Yankwich had said "in substance and effect that in his opinion there was no legal justification for the suspension or discharge of any of the persons whose conduct before the committee resulted in their indictment; that he hoped that none of the cases arising out of such suspensions or discharges came before him, but if they did, he would have no alternative but to render judgment for the plaintiffs in such actions and that if he were the attorney for such plaintiffs he could recover judgment in their favor for millions of dollars."[2] The names of persons present, the place, the occasion, and approximate date of the remarks were included. Treating the affidavit as true, Judge Yankwich found the facts stated insufficient to show the personal bias he considered necessary to disqualify him under Section 21. The section provides: "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice against him or in favor of any opposite party to the suit, such judge shall proceed no further therein. . . . Every such affidavit shall state the facts and reasons for the belief that such bias or prejudice exists."[3] The application for transfer was denied. *Cole v. Loew's, Inc.*[4]

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314 U.S. 495 (1942). There is some dispute as to what the character of the change and the length of time have to be. In the Ellis case the court stated that both the method of restraint of competition must be abandoned and the consequences of the practices fully dissipated. In general, see Bateman, op. cit. supra note 12, at 61.

[1] 36 Stat. 1090 (1911), 28 U.S.C.A. § 25 (1927).

[2] Cole v. Loew's, Inc., 76 F. Supp. 872, 875 (Cal., 1948).

[3] 36 Stat. 1090 (1911), 28 U.S.C.A. § 25 (1927).

[4] 76 F. Supp. 872 (Cal., 1948).

While "for the record" Judge Yankwich denied the accuracy of the affidavit,[5] he could pass only upon its "legal sufficiency" and not upon its truth or falsity, according to the well-established rule first announced by the Supreme Court in *Berger v. United States*.[6] The holding of insufficiency in the present case was based on failure to meet the requirement that the bias or prejudice be *personal* —"not the possession of definite views of the law or even a 'prejudgment' of the controversy, but a personal attitude of enmity directed against the suitor." Judge Yankwich classified the statements set out in the affidavit as merely preconceived ideas of the law which might have been written in a legal text, and hence as insufficient to support the allegation of personal bias.

Strict construction of Section 21 is supported by prior cases,[7] some of them involving prejudgment which, although more patent than that in the present case, were still held not to disqualify.[8] Supreme Court precedent is lacking on the question of whether an expression of opinion on the merits of a case should disqualify. *Berger v. United States*, the Supreme Court's only determination of the sufficiency of an affidavit under the section, set up this test: "The reasons and facts must give fair support to the charge of a bent of mind that may prevent or impede impartial judgment."[9] This was an espionage case involving several German-Americans. Although the necessity that the bias be of a personal nature was not stressed, the facts in the *Berger* case seem strong enough to fulfill a requirement of personal enmity.[10] Only four subsequent appellate decisions have been found holding affidavits sufficient,[11] all of them relying chiefly on the *Berger* case.

[5] Ibid., at 878.

[6] 255 U.S. 22 (1920).

[7] Skirvin v. Mesta, 141 F. 2d 668 (C.C.A. 10th, 1944); Scott v. Beams, 122 F. 2d 777 (C.C.A. 10th, 1941).

[8] In re Lisman, 89 F. 2d 898 (C.C.A. 2d, 1937) (affidavit that judge had told a trustee in bankruptcy that he would deny the pending petition of a group of bondholders and had also turned over documentary evidence in the case to a group of creditors who opposed the petition held insufficient, since statements were merely indiscreet expressions); Johnson v. United States, 35 F. 2d 355 (D.C. Wash., 1929) (affidavit claiming the judge had said that none of the claimants in war risk insurance actions would recover in a trial before him so long as the claimant could raise his hand held insufficient; but affidavit was also untimely, uncertain, and in bad faith); Henry v. Speer, 201 Fed. 869 (C.C.A. 5th, 1913) (judge's submittal to a newspaper of an article prejudging a pending case held to show prejudgment merely of the merits of the controversy, a situation against which Section 21 was not directed).

[9] 255 U.S. 22 (1920). Ex parte American Steel Barrel Co., 230 U.S. 35 (1913), the only other Supreme Court case involving the section, expresaly limited itself to a narrow holding denying mandamus to requalify a judge after disqualification.

[10] However, McReynolds, J., one of three dissenting justices, maintained that the affidavit merely showed prejudice toward a class and not against any one defendant. Berger v. United States, 255 U.S. 22, 42–43 (1920).

[11] In Schmidt v. United States, 115 F. 2d 394 (C.C.A. 6th, 1940), it was charged that the judge had expressed a prejudicial opinion regarding the facts of the case and the guilt of the defendant. In Morris v. United States, 26 F. 2d 444 (C.C.A. 8th, 1928), the affidavit claimed that the judge had described the defendant as one of the worst bootleggers in the country. In Nations v. United States, 14 F. 2d 507 (C.C.A. 8th, 1926), the affidavit stated that the judge had said that the defendant was guilty of conspiracy to violate prohibition laws. Lewis v. United

The reason given for strict interpretation in *Cole v. Loew's, Inc.* and earlier decisions is fear of abuse of the statute. However, safeguards pointed out in the *Berger* decision[12] limit the danger to some extent. An untruthful affidavit would put the maker in danger of prosecution for perjury and would subject the attorney to disbarment.[13] The affidavit's value as a delaying action is limited by by the requirement that it must be filed ten days before commencement of the term unless good cause can be shown. Furthermore, only one transfer of judges is permitted. The requirement that the affiant state his reasons for belief that bias exists permits elimination of affidavits based on rumor or gossip. Still it is true that, whether or not the judge is disqualified, some delay is obtained. Moreover, even if an affidavit is held insufficient, a party may take exception and have ground for appeal after losing on the merits.

But the argument as to possibilities of abuse was met by the Supreme Court's conclusion in the *Berger* case that "Congress was aware of them and considered that there were countervailing benefits."[14] The *Loew's* decision does not discuss the legislative intent behind Section 21, but from debates in Congress[15] it is clear that the sponsors of the bill wanted it to provide disqualification which should not be contingent on the judge's finding that the reasons given, if true, established the presence of bias. The absence of any provision in the act for a fact-finding machinery to determine whether the judge is actually prejudiced and the lack of a requirement that prejudice be proved suggest the same primary intent to relieve the litigant of a judge in whom he has no confidence rather than to provide a remedy only against bias, actual or reasonably inferred.

Such nearly automatic operation was not, however, assured in the wording of the act. As a result, the courts have apparently felt that the requirement of an affidavit alleging *personal* bias or prejudice, with reasons for such belief, is so clear that they can focus on the plain meaning of the words[16] and need not investigate an intent expressed only orally in Congress. Since the act does not define or give examples of personal bias or prejudice, the construction by the courts, although admittedly strict, is difficult to attack. Some meaning must be given to the word "personal."

The idea of allowing litigants the power of automatic rejection of the judge

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States, 14 F. 2d 369 (C.C.A. 8th, 1926), did not report the statements of the affidavit but merely held that if the affidavit is in proper form the judge is to proceed no farther.

[12] Berger v. United States, 255 U.S. 22, 34–35 (1920).

[13] The effectiveness of these restraints where a judge has been merely "misquoted" may be open to question.

[14] Berger v. United States, 255 U.S. 22, 35 (1920).

[15] 46 Cong. Record 306, 307, 2626–30 esp. 2629 (1911). In the discussion prejudice was referred to as "taking sides," which would conceivably include prejudgment of the merits.

[16] Craven v. United States, 22 F. 2d 605, 607 (C.C.A. 1st, 1927), cert. den. 276 U.S. 627 (1927), states that the word "personal" characterizes the prejudgment guarded against and is "the significant word" of the statute.

scheduled to preside has not been popular with the judiciary.[17] Judge Yankwich manifested this sentiment in stating the seldom-expressed view that a judge has an affirmative duty to stay in a case even though his impartiality has been challenged by an insufficient affidavit.[18] He quoted *United States v. Buck*,[19] which vigorously declared that a judge is the representative of the sovereign, not of the parties, and should not abandon his trust merely because one of the parties is opposed to him. This position has some force. Since judges are an established part of the mechanism for obtaining justice, litigants taking the benefits of the system must also accept individual differences among judges. To insure public respect for the judiciary, any federal judge should be presumed capable of administering a fair trial in any case until his acts indicate otherwise. If district judges were to step aside on insufficient affidavits, their rank would be similar to that of paid referees or jurors, whom parties may pick and choose. It was such "shopping for a judge" that Judge Yankwich wanted to prevent.

But although Judge Yankwich's opinion implies that only personal enmity could under any circumstances result in an unfair trial, it would seem that an expression of opinion on the merits of a case by a judge could be strong enough to entitle a litigant to some form of relief.[20] First, it demonstrates a lack of open-mindedness toward a cause, an adverse leaning without just grounds or before complete knowledge of the facts. Although impersonal, such an opinion impairs part of the fundamental right to a fair trial—the right to be tried by a judge who is reasonably free from bias.[21] Second, it impairs the appearance of a fair trial and a litigant's confidence that justice will be done. *Whitaker v. McLean* states, "The policy underlying Section 21 is that the courts of the United States 'shall not only *be* impartial in the controversies submitted to them, but shall *give assurance* that they are impartial'; i.e., shall *appear* to be impartial."[22] But opinions vary as to what expressions by a judge lead to a reasonable inference that he is incapable of conducting a fair trial. Judge Yankwich, in the present case, maintains that a judge should not have to "padlock his civic conscience and deny himself the right of a free man to express his views on civic or governmental matters in the privacy of a friend's home." A Supreme Court justice has said, "While 'an over-speaking judge is no well-tuned cymbal,' neither is an

[17] Judge Yankwich pointed out that since the enactment of Section 21 in 1912, courts have sought to protect federal trial judges against the one-sidedness of the procedure. He compared it unfavorably with the California practice, which provides for counter-affidavits by the judge and their submission to another judge. Cal. Code Civ. Proc. (Hillyer-Lake, 1947) § 170.5.

[18] In Saunders v. Piggly Wiggly Corp., 1 F. 2d 582 (D.C. Tenn., 1924) the judge withdrew from the case even though he found the affidavit insufficient.

[19] 18 F. Supp. 827 (Mo., 1937).

[20] See Leonard v. Wilcox, 101 Vt. 195, 219, 220, 142 Atl. 762, 772 (1928), where the judge had said that no matter what evidence was presented in the second trial of the case, his decision would be the same.

[21] Whitaker v. McLean, 118 F. 2d 596 (App. D.C., 1941).

[22] Ibid. (italics added). See King v. Sussex Justices, [1924] 1. K.B. 256, 259, stressing that justice should "manifestly" be done.

amorphous dummy unspotted by human emotions a becoming receptacle for judicial power."[23] On the other hand, one state court has warned that a judge should never commit himself upon any question either of fact or of law which is likely to come before him.[24] Although most states do not enforce this strict standard,[25] some have limited judicial expression by disqualification statutes providing for automatic change of venue.[26] A more flexible view which would still provide protection for litigants was taken in *Mitchell v. United States:* "It is the duty of all courts to guard against an *appearance* of prejudice which might generate in the minds of litigants *a well-grounded belief* that the presiding judge is personally biased or prejudiced *against their cause.*"[27] This is similar to the "fair support" test in the Berger case. Such a test of sufficiency, unlike that applied by Judge Yankwich, would not preclude disqualification for prejudgment of the merits of a case.

The problem under any disqualification procedure lies in determining when the danger of a partisan trial outweighs the danger of obstructing the administration of justice. It is submitted that a litigant deserves relief whenever he can show a well-grounded belief of a lack of openmindedness by the judge, whether based on expressions of personal or of impersonal sentiments. The wording of Section 21 failed to provide such relief, according to the hardly assailable construction adopted in *Cole v. Loew's, Inc.* and supporting decisions. Instead of permitting the judge whose impartiality has been questioned to decide whether his alleged acts have demonstrated bias, a more satisfactory result could be obtained by submitting the question to a second district judge. Such a procedure is not prohibited in the act and was described in *Craven v. United States* as "a fitting and common practice."[28] Under the prevailing view a litigant in the federal courts has little hope of using the section unless he can show evidence of personal animosity, regardless of how much unfriendliness the judge has shown to his cause. The section thus applies only to a comparatively rare situation and is relatively ineffective in some cases where there is an appearance of partiality.

EFFECT OF TAFT-HARTLEY UNION REQUIREMENTS ON STATE ANTI-INJUNCTION ACT

About 100 employees of the Smith Cabinet Mfg. Co., of Salem, Indiana, went on strike to force the company to recognize Local 309, United Furniture Workers of America (CIO), as their bargaining representative. Although aware

[23] Justice McReynolds, dissenting, in Berger v. United States, 255 U.S. 22, 42 (1920).

[24] See Crawford v. Ferguson, 5 Okla. Cr. 377, 387, 115 Pac. 278, 282 (1911).

[25] Fishbaugh v. Fishbaugh, 15 Cal. 2d 445, 101 P. 2d 1084 (1940); Bradburn Motors Co. v. Moverman, 63 R. I. 67, 7 A. 2d 207 (1939); King v. Grace, 293 Mass. 244, 200 N.E. 346 (1936).

[26] Ariz. Code Ann. (1939) §§ 21–107; Colo. Stat. Ann. (Michie, 1935) c. 170 § 1; Ind. Stat. Ann. (Burns, 1933) §§ 2-1401, 2-1404, 9-1301; Mich. Stat. Ann. (Henderson, 1936) c. 27.466; Mont. Rev. Codes Ann. (Anderson & McFarland, 1935) § 8868.

[27] 126 F. 2d 550, 552 (C.C.A. 10th, 1942) (italics added).

[28] 22 F. 2d 605, 606 (C.C.A. 1st, 1927).

that the union had won a consent election, and admitting its majority status, the company refused to arbitrate or negotiate until the union was certified by the NLRB. The union, however, could not be certified because it refused to register and to file non-Communist affidavits as prescribed by Section 9(f), (g), and (h) of the Taft-Hartley Act.[1] Because of the violence which accompanied the strike the company secured a decree against the employees individually, enjoining the commission of unlawful acts in connection with the picketing. The union contended that the issuance of the injunction was prohibited by the Indiana "little Norris-LaGuardia Act,"[2] which provides that no restraining order or injunctive relief shall be granted to any complainant in a labor dispute who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery.[3]

The existence of a labor dispute within the meaning of the act and the propriety of the scope of the injunction issued were recognized by both parties. The only question was whether the registration and filing provisions of the Taft-Hartley Act affected or nullified the requirement of the Indiana statute. On appeal, the Appellate Court of Indiana held that if a union is not eligible for certification under the Taft-Hartley Act it need not be recognized as the representative of the employees, and since recognition was the employees' sole demand there was nothing to negotiate, mediate, or arbitrate.[4] Admitting that under the Wagner Act[5] the company might have been required to recognize the union even without certification, the court decided that this would be contrary to the spirit of Section 9(f), (g), and (h) of the Taft-Hartley Act and that the issuance of the injunction was therefore proper. Judge Bowen dissented on the ground that the Taft-Hartley Act has no bearing on the question of the conditions precedent to the right of the employer under the Indiana act to secure an injunction for alleged individual acts of the employees.

If a union has failed to comply with Section 9(f) and (h) of the Taft-Hartley Act, the NLRB is prohibited from investigating disputes concerning representation, receiving petitions concerning elections, or issuing complaints pursuant to charges of unfair labor practices at the behest of the union. Failure to comply with Section 9(g) is similarly penalized and in addition renders the union ineligible for certification.

Despite the specific nature of the sanctions imposed by the Taft-Hartley Act, in some respects the majority view in the instant case is persuasive. The anti-Communist temper of the 80th Congress is apparent in many of its actions, and it is fair to assume that the purpose of Section 9(h) of the Taft-Hartley Act was to eliminate or at least to minimize the influence of Communists in the

[1] Labor Management Relations Act § 9(f), (g), (h), 61 Stat. 143 (1947), 29 U.S.C.A. § 159 (Supp., 1947).

[2] Ind. Stat. Ann. (Burns, 1933) §§ 40-501 to 40-514. [3] Ibid., at § 40-508.

[4] Fulford v. Smith Cabinet Mfg. Co., Inc., 77 N.E. 2d 755 (Ind. App., 1948).

[5] National Labor Relations Act, 49 Stat. 449-57 (1935), 29 U.S.C.A. §§ 151-66 (1947).

labor movement. The apparent intent of Section 9(f) and (g) was to provide some regulation of the internal affairs of unions. To allow an injunction against a union which had not complied with these provisions, without requiring the employer first to negotiate, would increase the pressure on the union to qualify, and thus further the aims of the provisions. To deny the injunction and require the employer to negotiate first would enable the union to bargain without complying, and thus tend to defeat the congressional policy. There can be little doubt that the 80th Congress would applaud the attitude of the company in this case.

While there is no conflict between the express provisions of the two acts, there does appear to be a conflict between the underlying policies where, as in the instant case, a non-complying union is involved. In dealing with federal statutes reflecting conflicting policies the United States Supreme Court has restricted the application of one act in order that the policy of the other should not be frustrated.[6] Where a state act and a later federal statute are involved, the policy behind the federal statute carries added weight. This consideration, combined with a recognition of the anti-Communist policy underlying Section 9(h), lends some force to the argument that the policy of the Indiana anti-injunction act should be subordinated to the policy behind the registration and filing provisions of the Taft-Hartley Act, and that therefore the protection provided by the pertinent section of the Indiana act should be limited to certified unions.[7]

The jurisdictional relationship of the NLRB and state agencies lends support to the argument that the federal policy should prevail. Whenever the NLRB either acts or specifically refuses to act, it has assumed jurisdiction,[8] and that jurisdiction is exclusive. Thus, state conciliators and labor boards have

[6] Southern Steamship Co. v. NLRB, 316 U.S. 31 (1941), provides an example of such judicial accommodation. In that case, a strike which had resulted in the subsequent discharge of the striking seamen was held to be mutiny under Sections 292 and 293 of the Criminal Code. The NLRB was held powerless to order the reinstatement of the strikers under the Wagner Act. Justice Byrnes said: ". . . the Board has not been comissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another." Ibid., at 46; cf. United States v. Hutcheson, 312 U.S. 219, 229 (1941).

[7] This argument is somewhat attenuated by the fact that the policies of Section 9(f), (g), and (h), if given the strength which the court in the instant case accords them, are themselves in conflict with some of the more general policies of the Taft-Hartley Act, which favor peaceful settlement of labor disputes through mediation and administrative determination. The Taft-Hartley Act, moreover, must be read in conjunction with the Norris-La Guardia Act. While certain sections of that federal anti-injunction law conflict directly with, and are therefore superseded by, provisions in the more recent Taft-Hartley Act, the basic policy of the Norris-La Guardia Act is still in effect. An important element of that policy is to encourage collective bargaining through representatives freely chosen by the workers. 47 Stat. 70 (1932), 29 U.S.C.A. § 102 (1947).

[8] Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947); Labor Management Relations Act § 10(a), 61 Stat. 143 (1947), 29 U.S.C.A. § 160(a) (Supp., 1947); see Overlapping Federal and State Regulation of Labor Relations, 15 Univ. Chi. L. Rev. 362 (1948).

been held powerless to act where the NLRB had refused to act because of a union's non-compliance with the registration and filing requirements of the Taft-Hartley Act.[9] In the present case the NLRB had held a consent election before the effective date of the Taft-Hartley Act. If the election constituted a taking of jurisdiction, state machinery for arbitration would not be available. But the employer could still comply with the Indiana act, which does not restrict peaceful settlement to the use of governmental machinery. The alternative statutory requirement of private negotiation would remain open.

In *Scranton Broadcasters, Inc. v. American Communications Association (CIO)*,[10] a Pennsylvania court of common pleas reached the same result as the Indiana court on substantially identical facts. Most of the force of that decision is lost, however, because the opinion seems to have been motivated by an unbridled antagonism toward Communism and labor unions rather than by any reasoned conclusion as to the relationship of the acts in question.[11]

The considerations supporting the majority view in the instant case are more than balanced by the arguments on behalf of the minority position. While the few analogous cases also allowed injunctions to issue, they are distinguishable because they involved efforts by the unions to force employers to engage in unlawful activities.[12] In *Simons v. Retail Clerks' Union*[13] the defendant union, which had not complied with the registration and filing requirements of Section 9(f), (g), and (h), picketed the plaintiff's store demanding a closed shop and the right to represent the employees as bargaining agent. The NLRB, as required by Section 9(f), (g), and (h), had refused an earlier petition of the employer to determine whether this union was the proper bargaining agent. Since the closed shop is outlawed by the Taft-Hartley Act[14] and since there was no assurance that the union had in fact been selected by a majority of the employees, any compliance by the employer with the union demands would have been illegal. Similarly, in a pre-Taft-Hartley Indiana case, *Roth v. Local Union No. 1460, Retail Clerks' Union*,[15] an injunction was issued at the request of an

[9] Linde Air Products Co. v. Johnson, 77 F. Supp. 656 (Minn., 1948); In re Eau Claire Press Co. and Eau Claire Typographical Union (unaffiliated), 21 L.R.R.M. 1085 (Wis. ERB, 1947).

[10] 21 L.R.R.M. 2024 (Pa. Ct. Com. Pl., 1947).

[11] The judge declared that the state anti-injunction statute was no longer necessary in view of the organization of Soviet espionage and the standing instructions of Communist agents to bore from within labor unions. After he took judicial notice that the Soviet power is an enemy of the United States, the judge incorporated the Christian religion into the common law and invoked the constitutional guarantee of the republican form of government and the proscription of treason as the bases for his decision.

[12] Simons v. Retail Clerks' Union, 21 L.R.R.M. 2685 (Cal. Super. Ct., 1948); Roth v. Local Union No. 1460, Retail Clerks' Union, 216 Ind. 363, 24 N.E. 2d 280 (1939); American News Company, Inc., and Magazines, Mailers' & Deliverers' Union of North Jersey, 55 N.L.R.B. 1302 (1944), commented on in Availability of NLRB Remedies to "Unlawful" Strikes, 59 Harv. L. Rev. 747, 765 (1946).

[13] 21 L.R.R.M. 2685 (Cal. Super. Ct., 1948).

[14] 61 Stat. 140 (1947), 29 U.S.C.A. § 158(a) (3) (Supp., 1947).

[15] 216 Ind. 363, 24 N.E. 2d 280 (1939).

employer who had complied with all the requirements of the law. None of his employees wished to strike or to join the union which was picketing the employer in an effort to force him to accept a closed shop. The court interpreted the Indiana anti-injunction act as outlawing the closed shop, so that compliance with the union's demands would have been in violation of the act.

The instant case does not involve any attempt to compel the employer to engage in any unlawful activities. There was no demand for a closed shop, and the union was selected by a majority of the employees as their bargaining representative in an NLRB election. The General Counsel of the NLRB has stated that under the Taft-Hartley Act the employer is free to negotiate about representation with an uncertified union even though it cannot be certified.[16] In a memorandum to the Secretary of Labor, the Solicitor of Labor declared that Section 9(f) and (h) has no application to a union which voluntarily determines that it does not need or desire to use NLRB machinery.[17] Unions may continue traditional and legitimate trade-union activities without recourse to the remedies and procedures of the National Labor Relations Act, as amended by the Taft-Hartley Act. Not only is the employer free to bargain with uncertified unions, but to a limited extent certain facilities of the NLRB and other government agencies are available to such unions.[18]

[16] The statement of the General Counsel was made in a letter concerning an NLRB dismissal of two petitions of Remington Rand for representation elections. The dismissal was based on the fact that the previously certified union, not having qualified under Section 9(f) and (h) of the Taft-Hartley Act, could not be placed on the ballot. Compare H.R. Rep. 245, 80th Cong. 1st Sess. (1947).

[17] "The inability of a union to secure Board certification because it has not filed the affidavits and organizational and financial statements provided for in Section 9(f) and (h) of the Act does not disqualify the union from acting as the bargaining representative of the employees, and does not, therefore, bar the employer from bargaining with the union." C.C.H. Lab. L. Serv. ¶ 8465 (1948). It might even be argued that it is an unfair labor practice for an employer to refuse to bargain with a union chosen by the employees as their bargaining representative, even though the union has not complied with the qualifying provisions for certification. Refusal by an employer to bargain collectively with the representative of his employees is made an unfair labor practice under Section 8(a) (5) of the Taft-Hartley Act, subject to the provisions of Section 9(a), which provides only that the representative selected by the majority of the employees shall, with certain exceptions, be the exclusive bargaining representative. The provision is not made subject to Section 9 as a whole, which would include the registration and filing requirements. Of course an uncertified union could not appeal to the NLRB for enforcement of its rights as bargaining representative. Negotiation between such a union and the employer, however, would clearly involve no illegal act.

[18] The NLRB ruled that it has the power to order an employer to deal with a non-certified union which has not met the qualifications for certification. Considering such an order tantamount to certification, however, the NLRB conditioned its order on the union's meeting the qualifications within a specified period. Marshall and Bruce Co. and Nashville Bindery Workers Union No. 83, International Brotherhood of Book Binders (AFL), 21 L.R.R.M. 1001 (NLRB, 1947). Unqualified unions with existing contractual interests have been allowed to intervene in NLRB determinations and to have their names on representation ballots. Bush Woolen Mills and Textile Workers Union of America (CIO), 21 L.R.R.M. 1218 (NLRB, 1948); Marine Iron Bridge and Ship Building Co. and International Brotherhood of Boilermakers, Iron Ship Builders, and Helpers of America, Local No. 415 (AFL), 21 L.R.R.M. 1258 (NLRB, 1948). Similarly, unions which had previously been certified have been placed

Little mention of the provisions of Section 9(f), (g), and (h) is found in the legislative history of the Taft-Hartley Act, and where they are discussed they are consistently referred to merely as prerequisites for certification.[19] Congress could have provided that no Communist could be an officer of a labor organization or that no union which failed to meet all the prerequisites could act as bargaining representative for any group of employees.[20] Instead of thus outlawing non-complying unions, the Act provides very specific sanctions, which in effect deny certain facilities of the NLRB to unions which have not filed the prescribed reports and affidavits. This denial, while not an extremely severe punishment,[21] does impose a number of significant disadvantages on unions which do not qualify, particularly if such unions are new or weak. The denial results in a loss both of powerful legal weapons and of bargaining power. The sanctions imposed are probably sufficient to induce most unions to meet the requirements. Carried to its logical conclusion, the approach adopted in the instant case leads to a virtual outlawing of non-complying unions. Since Congress has chosen specific inducements to secure compliance with the requirements of the Act, it is not for the courts to create new and greater penalties.

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on decertification ballots even though they have not complied with the registration and filing provisions, and the NLRB has stated that it would announce the arithmetic result of the elections should the non-complying union win. Harris Foundry & Machine Co. and United Steelworkers of America, 21 L.R.R.M. 1146 (NLRB, 1948).

Local unions which have qualified for certification have been allowed access to NLRB machinery although sister locals had not qualified and although the AFL or CIO, with which they were affiliated, had failed to comply. Northern Virginia Broadcasters, Inc., Radio Station WHRL, and Local Union No. 1215, International Brotherhood of Electrical Workers (AFL), 20 L.R.R.M. 1319 (NLRB, 1947). It has been suggested informally by Associate Counsel Brooks of the NLRB that the NLRB would act on discrimination charges, but not on charges of refusal to bargain, when made by an individual member of an uncertified union. This distinction was drawn in an effort to prevent use of this device to avoid the necessity of union registration entirely. Mulroy, The Taft-Hartley Act in Action, 15 Univ. Chi. L. Rev. 595, 624 (1948).

The Federal Mediation and Conciliation Service has made its facilities available in cases where the Service would otherwise assume jurisdiction even though the union has not filed its registration statements and non-Communist affidavits. "The filing requirements in Section 9(f) and (g) specifically relate to the availability to unions of remedies afforded by Title I of the LMRA. They do not constitute a restriction upon the mediation and conciliation activities of the Service which is under a statutory obligation to make its facilities available in the public interest in the types of labor disputes described in Title II." C.C.H. Lab. L. Serv. ¶ 9003 (1948).

In view of the foregoing materials, the statement in Simons v. Retail Clerks' Union, 21 L.R.R.M. 2685 (Cal. Super. Ct., 1948), that the Taft-Hartley Act in effect outlaws non-certified unions must be discounted.

[19] H.R. Rep. 510, 80th Cong. 1st Sess. (1947); 93 Cong. Rec. 5081–86 (1947); 93 Cong. Rec. 5095–96 (1947).

[20] Whereas the registration and filing provisions are located in Section 9, which deals with representation and elections, the appropriate place for an outlawing provision would be Section 7, which concerns employees' rights.

[21] Comments, The Labor-Management Relations Act of 1947, 42 Ill. L. Rev. 444, 487–91 (1947). Some legislators felt that denying the use of NLRB machinery to non-complying unions would be an inadequate sanction. 93 Cong. Rec. 6381, 6388, 6455, 6497 (1947).

The provisions of Section 9(f), (g), and (h) of the Taft-Hartley Act, then, are really quite limited in their applicability. While intended to increase governmental control over internal union administration and discourage Communism in American labor, they impose only certain limited disabilities on unions which do not comply with their requirements. They are therefore quite unrelated to the Indiana "little Norris-LaGuardia Act." The policy of the Indiana statute is not only to settle labor disputes peaceably whenever possible, but to allow the use of injunctions only as a last resort.

As Judge Bowen pointed out in his dissent,[21] the Indiana Act applies to all labor disputes, regardless of whether a union is involved. On the other hand, Section 9(f), (g), and (h) of the Taft-Hartley Act relates only to unions. Yet the complaint in the instant case named a large number of individuals as defendants, and the result of the majority decision was to enjoin these individuals from mass picketing and certain other specified acts.

Even if the injunction in the instant case were directed only at the union, the decision of the court would not seem justified. Registration and filing of non-Communist affidavits entitle the union to certain advantages under the Taft-Hartley Act. Indiana's "little Norris-LaGuardia Act" provides certain prerequisites for the granting of an injunction in a labor dispute. If the union wishes to use the facilities of the NLRB, let it comply with the prerequisites of registration and filing. If the employer wishes to secure an injunction from an Indiana court, let him comply with the prerequisites of first making a reasonable effort to settle the dispute by whatever means are available. Section 9(f), (g), and (h) of the Taft-Hartley Act does not justify the issuance of an injunction in the face of a state anti-injunction statute requiring negotiation as a prerequisite to the granting of an injunction in a labor dispute.

PROPORTIONATE RECOVERY AS INSURER'S REMEDY FOR FRAUD CAUSING UNDERESTIMATION OF RISK

The defendant laundry company insured customers' goods in its possession under a bailees' customer policy taken out with the plaintiff insurance company. When a fire destroyed the laundry company's plant, customers claimed losses of goods amounting to $211,410.56, of which the insurance company paid $209,103.56. The policy provided that the insured was to keep accurate records of its business and was to report its total gross receipts to the insurer monthly. It was a relatively new type of policy, giving the insured complete coverage[1] but allowing for variation in the premium payments according to the amount of business during the period. On the basis of actuarial experience the insurer

[21] Fulford v. Smith Cabinet Mfg. Co., Inc., 77 N.E. 2d 755, 757 (Ind. App., 1948).

[1] In addition "[t]he policy was a continuing contract, subject, however, to cancellation by either party by the giving of 15 days' notice in writing." Automobile Ins. Co. v. Barnes-Manley Wet Wash Laundry Co., 168 F. 2d 381, 382 (C.C.A. 10th, 1948), cert. den. 69 S. Ct. 132 (1948).

was to estimate its approximate liability from the amount of gross receipts reported each month. The premium rate was accordingly based on a percentage of each $100 of gross receipts. At the time of the fire the insurer had estimated its liability at about $40,000, and it became suspicious when the customers' claims exceeded that figure. When the claims reached $90,000 the insurance company caused an audit to be made, which disclosed that the insured had reported only 43 per cent of its gross receipts and, accordingly, had paid only 43 per cent of what it should have paid as premiums.[2] Nevertheless, the insurer continued payment on the customers' claims.

The primary issue in the case under discussion concerned the proper form of relief. After the trial court had awarded judgment for plaintiff but allowed recovery only for the unpaid premiums, the insurance company appealed on the ground that the wrong measure of damages had been applied. The Circuit Court of Appeals for the Tenth Circuit reversed, holding that the proper measure of damages should have been that amount of the total liability of the insurance company which was proportionate to the amount of gross receipts concealed. Since the insured had concealed 57 per cent of its actual gross receipts, the insurer should have recovered 57 per cent of the amount paid out on the customers' loss claims. *Automobile Insurance Co. v. Barnes-Manley Wet Wash Laundry Co.*[3]

At least four possibilities for recovery suggest themselves under the circumstances of the instant case: 1) rescission of the insurance contract and recovery from the laundry company of an amount equivalent to the claims paid by the insurance company to the customers; 2) recovery of the difference between the total liability of the insurer and $65,000, the alleged top-limit of estimated risk which the insurer would have accepted without reinsuring;[4] 3) recovery of the unpaid premiums; and 4) proportionate recovery.

Rescission was denied on the ground that the insurance contract had been affirmed by the insurance company when it continued to pay customers' claims after discovering the laundry's fraudulent reporting of gross receipts. The court based its result on the rule denying rescission of contracts where the defrauded party, while knowing of the fraud, acts in such a way as to disclose an intention to let the transaction stand. This rule relies on the assumption that rescission, as a repudiation of the contract, is inconsistent with actions which affirm the

[2] The laundry reported only $1,823,914 as gross receipts rather than $4,097,138 and paid as premiums only $10,100.27 instead of $22,359.87. The evidence was submitted to the jury by special interrogatory as an issue of fraud and the finding was "that the Laundry Company, during the period the policy was in force, intentionally and knowingly reported its gross receipts in amounts less than they actually were, with intent to defraud and deceive the Insurance Company." Ibid., at 383.

[3] 168 F. 2d 381 (C.C.A. 10th, 1948), cert. den. 69 S. Ct. 132 (1948).

[4] This form of relief was requested with others in the alternative by the plaintiff insurer. Appellant's brief at 3–4, 40–50.

contract.[5] But the court did not appear to recognize that the insurer may have had substantial reasons, foreign to any intention to affirm the contract, for continuing to honor customers' claims. Nothing was said as to the insurance company's standing in the business community. Undoubtedly its good will would have been adversely affected if, after settling a large percentage of the claims, it had suddenly refused to pay those remaining. Furthermore, if such a course had been adopted, the insurer would probably have been confronted with numerous law suits.[6] Thus, the continuation of payments did not necessarily indicate an intention to affirm the contract. And if there was no affirmation of the contract, the right to rescind should not have been lost on this ground.

However, even in the absence of affirmation, rescission is an appropriate remedy only insofar as it places the parties in the position they would have occupied had no contract been entered into.[7] In the absence of contractual liability, a bailee is liable only for damage caused by his lack of due care,[8] and there was no indication that the fire resulted from negligence on the part of the laundry. If the laundry were not liable to its customers, the result of allowing rescission and recovery by the insurance company of the claims paid would be to force the laundry into the position of an involuntary insurer. Hence, the laundry would ultimately bear a loss which it could not have been compelled to assume had it not been insured. Of course, if the laundry were liable to its customers on a basis other than negligence, a decision requiring full restitution to the insurance company would be consistent with the theory of rescission. In this connection, the insurance company alleged that the laundry had collected a 1 per cent service charge from each customer to cover insurance.[9] In remanding the case the circuit court ordered that the truth of this allegation be determined, stating that "[i]f the Laundry Company collected a charge from its customers for insurance, it had a primary obligation to protect its customers against loss."[10]

The laundry company offered still another argument against rescission. It contended that the insurer was estopped from asserting a right of rescission,

[5] Prosser, Torts § 90, at 775 (1941); 5 Williston, Contracts §§ 1527–28 (rev. ed., 1936); Patterson, Essentials of Insurance Law § 76 (1935); 1 Rest., Contracts § 484 (1932); Vance, Insurance §§ 131–32 (2d ed., 1930); 1 Bigelow, Fraud c. ii, § 8, at 434–38 (1888).

[6] Although many claimants would probably sue, it is doubtful whether many would continue their suits once the insurance company successfully established its defense.

[7] Return to the status quo is a condition precedent to rescission which will only be overlooked if it is impossible of achievement and if the equities of the situation nevertheless demand rescission. 5 Williston, Contracts § 1500 (rev. ed., 1936). Since, in the instant case, the plaintiff has other forms of relief available, the equities would not seem to demand rescission.

[8] "[A] bailee is not liable for the loss, injury, or destruction of the bailed property without fault on his part, unless he expressly contracts, as he may, to assume the risk of such accidental loss or injury." 6 Williston, Contracts § 1946, at 5452–53 (rev. ed., 1936); 4 ibid., at § 1045.

[9] Automobile Ins. Co. v. Barnes-Manley Wet Wash Laundry Co., 168 F. 2d 381, 383, 386 (C.C.A. 10th, 1948), cert. den. 69 S. Ct. 132 (1948).

[10] Ibid., at 386.

since by paying the customers' claims the insurer deprived the laundry of any defenses which might have been available had the claims been pressed directly against the laundry.[11] Though the defendant did not allege or prove any particular defenses of which it might have been deprived, an example of such a defense might be an agreement between the laundry and its customers that the laundry was not to be responsible for any goods left over thirty days. But under the "clean hands" doctrine the defendant's fraudulent conduct would have precluded the assertion of estoppel even if the laundry could have shown that a defense had been lost.[12]

A second possible form of recovery would have given the insurance company the difference between its total liability and $65,000. The plausibility of such a recovery[13] depends upon the ability of the insurance company to prove that it would have reinsured had it estimated its risk as more than $65,000. The insurance company argued that the laundry's actual gross receipts were sufficiently large to require an estimated risk greater than $65,000.[14] Presumably, then, the insurer would have reinsured had the true gross receipts been reported. If such reinsurance could have been obtained, the insurance company's liability would have been limited to $65,000. The plaintiff therefore claimed that all liability in excess of that amount was the direct result of the fraudulent reports by the laundry company.

Proof that the insurance company would have reinsured was apparently not conclusive, since the trial court rejected evidence on this point as immaterial. The principal evidence offered was the deposition of one of the insurer's underwriters. While the majority of the appellate court claimed that they were unconcerned with such evidence,[15] they still appeared to take judicial notice of the practice of insurance companies to reinsure. The court also listed as "undisputed facts" the determination that "a top estimated risk of $65,000 . . . was the extent of the estimated risk [the insurer] was willing to assume and carry."[16] At any rate, the circuit court did not seem to take the argument seriously enough to prompt a clear articulation of its position. Perhaps the court took

[11] Appellee's brief at 24–38.

[12] Vance, Insurance §§ 138–39, at 524 (2d ed., 1930).

[13] The amount would be $144,103.56, the difference between what the insurer paid, $209,103.56, and $65,000. Presumably the insurer would not pay the remaining outstanding claims, but if it did then $211,410.56 would have to be substituted for $209,103.56 and the resulting figures adjusted accordingly.

[14] If on the basis of 43 per cent of the gross receipts the insurer estimated its liability at $40,000, then it would have estimated its liability in excess of $65,000 on the basis of 100 per cent of the gross receipts. Assuming a straight-line relationship between the reported receipts and the estimated liability, on the basis of the total gross receipts the estimated risk would have been approximately $93,000.

[15] "We are not concerned with the question of whether testimony was admissible to the effect that the Insurance Company would have reinsured the estimated risk when it rose above $65,000." Automobile Ins. Co. v. Barnes-Manley Wet Wash Laundry Co., 168 F. 2d 381, 385 (C.C.A. 10th, 1948), cert. den. 69 S. Ct. 132 (1948).

[16] Ibid., at 385–86.

notice of the fact that the insurance company estimated its risk at "about $40,000" on the basis of the laundry's reported gross receipts—43 per cent of the true gross receipts. As it turned out, 43 per cent of the total claims exceeded $90,000. If the insurance company could do no better in its estimation than to come within $50,000 of what proved to be its actual risk, the court was justified in treating this argument lightly.

It should also be pointed out that the insurer made no showing that it could have obtained reinsurance even if it had attempted to do so. The insurance policy is of a new type which leaves the actual risk unascertained until loss is sustained. Since the indirect estimates which must be made can be extremely erroneous, as demonstrated in this case, it might well be that reinsurance would have been unobtainable.

If, however, the matter of reinsurance could have been proved, it would seem to be an appropriate measure of damages for the defendant's deceit. In the words of the dissenting judge, "The general rule in cases of fraud is that the defendant is liable for damages that are the natural and proximate result of his wrong-doing." But the judge added that "[t]he damages which are the proximate result of the wrong are those which must be presumed to have been within the wrong-doer's contemplation at the time he committed the fraud."[17] This contemplation rule seems hardly appropriate in an action of deceit involving deliberate misrepresentation, since there is no reason for the law to be solicitous of intentional wrongdoers.[18] In any event, the rule should not be a bar in the instant situation. The laundry was informed that the gross receipt reports were to be used by the insurer to enable the latter to estimate its liability.[19] Hence, the insured must have contemplated that its reports would be relied upon by the insurer in the management of its business. Since the precise injury does not have to be contemplated[20] and since the insured must have contemplated some business reliance upon its reports, the added liability caused by failure to reinsure might well have been considered as a measure of damages.

A third possible relief is recovery of the unpaid premiums. However, this measure of recovery would enable the insured to have his interests fully protected while he received the benefit of a lower premium rate as the result of his fraudulent representations. The insured would get a certain amount of his insurance free unless a loss greater than the estimated risk caused investigation of the circumstances, and only then would the insurer receive adequate premi-

[17] Ibid., at 387.

[18] See Selman v. Shirley, 161 Ore. 582, 627, 91 P. 2d 312, 318 (1939); McCormick, Damages § 121, at 450 n. 9 (1935); ibid., § 122, at 460 nn. 52, 53; 1 Sutherland, Damages § 16, at 52–59 (4th ed., 1916); 1 Sedgwick, Damages §§ 139–42 (9th ed., 1912); 1 Bigelow, Fraud c. xi, § 1, at 634 (1888).

[19] Automobile Ins. Co. v. Barnes-Manley Wet Wash Laundry Co., 168 F. 2d 381, 383 (C.C.A. 10th, 1948), cert. den. 69 S. Ct. 132 (1948).

[20] 1 Sutherland, Damages § 16, at 52–59 (4th ed., 1916); 1 Sedgwick, Damages § 111c (9th ed., 1912).

ums for the real risk assumed. Such a retrospective method of premium payment is inconsistent with general insurance practice, in which premium rates are determined on the basis of calculated prospective risks.

The remedy allowed by the circuit court was proportionate recovery. The court stated that "[t]hrough its fraud, the Laundry Company induced the Insurance Company to assume and carry a risk greatly in excess of the risk which the Insurance Company contemplated and believed it was carrying and which it was willing to carry. If the Laundry Company collected a charge from its customers for insurance, it had a primary obligation to protect its customers against loss. Through its fraud, it induced the Insurance Company to carry that obligation and the Insurance Company, to the extent of 57 per cent of the amount paid out under the policy for loss of customers, discharged the obligation of the Laundry Company and would be entitled to restitution for that amount from the Laundry Company."[21] In other words, the only risk the insurer had bargained for was one proportionate to the reported gross receipts, and any additional risk was assumed by the laundry company. Although the insurer agreed that the policy was for unlimited coverage, that fact loses significance in light of the possibility of cancellation. Not only do equity principles permit cancellation where actual fraud has been discovered,[22] but the policy itself provided that either party could cancel by giving fifteen days' written notice.[23] Therefore, the crucial determinant of the risk assumed was the reported gross receipts, and on that basis the insurer had only assumed 43 per cent of the risk.[24]

Misrepresentation in insurance contracts often causes the insurer to assume a risk which, although acceptable, would require the payment of higher premiums. Proportionate recovery has been recommended in these situations as fairer to the insured than the harsh doctrines of rescission and cancellation for false warranties.[25] Rather than precluding the insured from recovering anything on a policy, the proportionate-reduction-of-recovery principle prevents forfeiture by allowing the insured to recover that amount to which he would have

[21] Automobile Ins. Co. v. Barnes-Manley Wet Wash Laundry Co., 168 F. 2d 381, 386 (C.C.A. 10th, 1948). The court also states that "[i]f the reports of the gross receipts had been true, the liability of the Insurance Company would have been approximately 43 per cent of $211,410.56." This is misleading, since it would seem that if the reports had been true the insurer would have been liable for the total loss, not merely 43 per cent. There would have been no misrepresentation. Any discrepancy between its estimate of risk and its actual risk would be attributable to actuarial error or to the inadequacy of the liability-estimate theory used.

[22] Compare Hesselberg v. Aetna Life Ins. Co., 75 F. 2d 490 (C.C.A. 8th, 1935), cert. den. 296 U.S. 623 (1935); Mutual Life Ins. Co. of New York v. Lambert, 34 F. 2d 215 (D.C. Mo., 1929); New York Life Ins. Co. v. Sisson, 19 F. 2d 410 (D.C. Pa., 1926).

[23] See note 1 supra.

[24] The validity of this type of recovery depends upon there being a straight-line relationship between the reported gross receipts and the estimated risk. Otherwise the insurer's formula for estimating its risk would have to be used to ascertain the risk bargained for.

[25] Ehrenzweig and Kessler, Misrepresentation and False Warranty in the Illinois Insurance Code, 9 Univ. Chi. L. Rev. 209 (1942); Patterson, Essentials of Insurance Law § 75 (1935).

been entitled on the basis of the actual premiums paid had there been no misrepresentation. It is interesting to note that in this decision the court, without referring to such analogous situations, adopted a remedy which has been provided for in other instances by statute.[26] The principle is generally adopted in connection with misrepresentations as to age in life insurance contracts.[27] Proportionate recovery has also received recognition in statutes relating to fire insurance[28] and in other legislation prescribing the effects of changes of occupation[29] and the carrying of other insurance[30] on liability under accident insurance policies.

Although there are differences between the situation in the instant case and the few other situations in which the proportionate-reduction-of-recovery principle has been applied, the essential elements are the same: Had no misrepresentation been made, the insurer's only action would have been an assessment of higher premiums, not a refusal to insure. The fact that the beneficiaries under the policy were the customers rather than the insured, as in the usual situation, would seem to be no reason to preclude application of this doctrine. While the principle is ordinarily employed to protect the insured against forfeiture, it is appropriate, if not necessary, in the instant case in order to protect the insurer against fraud. The insurer is as deserving under these circumstances as is the insured in the typical proportionate-recovery case. The insurance company should be allowed a remedy which adequately provides that protection.

RES IPSA LOQUITUR IN AIRLINE ACCIDENTS

On June 13, 1947, a Capital DC-4 airliner on a regularly scheduled flight crashed into a mountain in West Virginia, killing all fifty occupants. In a consolidated action before the Federal District Court of the District of Columbia damages were sought for the wrongful death of two passengers on the plane. The defendant's motion to strike from the complaint allegations seeking to invoke the doctrine of res ipsa loquitur was denied by the court. *Smith v. Pennsylvania Central Airlines Company.*[1]

The court held the doctrine of res ipsa loquitur to be part of the substantive law and found that, under local conflict of laws rules, the applicable law was that of West Virginia, where the fatal injuries were incurred. As the question

[26] Reasoning from analogous statutes has been recommended by Roscoe Pound: The Relation of Courts to Legislation Not a New Question, 77 Cent. L.J. 219 (1913); Common Law and Legislation, 21 Harv. L. Rev. 383, 388 (1908).

[27] Authorities cited note 25 supra; Okla. Stat. Ann. (1941) tit. 36, § 218; N.Y. Insurance Law (McKinney, 1940) § 155, 1(d) (life insurance), § 159, 1(d) (annuities and pure endowment contracts), § 161, 1(d) (group life insurance), § 163, 1(d) (industrial life insurance).

[28] N.H. Rev. Laws (1942) c. 326, § 4.

[29] N.Y. Insurance Law (McKinney, 1940) § 164, 3(a) Form D.

[30] Ibid., § 164, 4(b) optional provision 17; Okla. L. (1947) tit. 36, c. 18, § 6 optional provision 2.

[1] 76 F. Supp. 940 (D.C., 1948).

of the applicability of res ipsa loquitur to air accidents was a point of novel impression in that jurisdiction, Justice Holtzoff felt bound to ascertain the relevant law "as a matter of principle and with the aid of such persuasive authorities as are available. . . ."[2]

Originally the doctrine that "the thing speaks for itself" was adopted in England to enable plaintiffs, in certain special circumstances,[3] to bring actions without specific allegations of negligence. The courts realized that in many instances the defendant's exclusive control over the damage-causing instrumentality made it impossible for the plaintiff to establish the cause of his injury.[4] After the Industrial Revolution, the increased degree of control exercised by the owners of enterprise over industrial machinery furnished grounds for the frequent application of the doctrine, and its use seemed particularly appropriate in cases involving accidental injuries to passengers of the large common carriers. In such instances, in addition, the desire of the courts to discourage recklessly carried out expansion and the concomitant neglect of adequate safety measures provided further incentive for the utilization of the doctrine. Hence res ipsa loquitur has been applied frequently against railroads, streetcars, busses, and other types of common (as well as private) carriers.

The rule has been variously interpreted as: 1) only permitting the jury to infer the defendant's negligence from the allegations made, thus saving the plaintiff merely from an involuntary nonsuit or from a directed verdict for the defendant where the latter makes no attempt to rebut;[5] 2) requiring the defendant to "go forward with the evidence" after the plaintiff's allegation of his prima facie case and, in case the defendant fails to present evidence, subjecting him to a directed verdict;[6] or 3) shifting the actual burden of proof from the plaintiff to the defendant, thereby placing upon the latter the "risk of nonpersuasion" of the jury.[7]

[2] Ibid., at 942.

[3] Conventionally the rule is held applicable when:
1) the defendant's instrumentality would not likely be injurious without human fault;
2) the instrumentality causing the injury is in the exclusive control of the defendant;
3) no act of the plaintiff can contribute to his injury.
9 Wigmore, Evidence § 2509 (3d ed., 1940); Res Ipsa Loquitur: Its Nature and Effect, 3 Univ. Chi. L. Rev. 126 (1935).

[4] The defendant's exercise of exclusive control does not necessarily mean that he can explain the actual cause of an injury better than the plaintiff, although this has sometimes been assumed as a reason for the rule. It does mean that the balance of probabilities points to the defendant's culpability. See generally Prosser, Torts 301 (1941).

[5] Blanton v. Great A. & P. Tea Co., 61 F. 2d 427 (C.C.A. 5th, 1932), cert. den. 288 U.S. 609 (1933); Foltis v. New York, 287 N.Y. 108, 38 N.E. 2d 455 (1941); Glowacki v. North Western Ohio R. & P. Co., 116 Ohio St. 451, 157 N.E. 21 (1927); see Alabama & V. Ry. v. Groome, 97 Miss. 201, 52 So. 703 (1910).

[6] Welter v. Bowman Dairy Co., 318 Ill. App. 305, 47 N.E. 2d 739 (1943); Riggsby v. Tritton, 143 Va. 903, 129 S.E. 493 (1925); 147 Va. 1084, 133 S.E. 580 (1925); Hogan v. Manhattan Ry., 149 N.Y. 23, 43 N.E. 403 (1896).

[7] Valletke v. Maison Blanche Co., 29 So. 2d 528 (La. App., 1947); Alabama Great Southern R. Co. vJohnson, 14 Ala. Ap p. 558, 71 So. 620 (1916).
For collections of cases and discussion of the different theories see Harper and Heckel, Effect

Precedent on the application of res ipsa loquitur to carrier airlines is unsettled. Seven courts have sidestepped the question of applicability because evidence of specific negligence was introduced, making it unnecessary or even improper to invoke the doctrine.[8] Use of the doctrine in cases which involved fact situations similar to that in the instant action, but many of which were distinguishable with respect to the amount of evidence available from survivors or observers, has been approved in six jurisdictions[9] and disapproved in four.[10]

Courts favoring applicability are impressed by the carrier-passenger relationship, which, in the United States,[11] is subject to "the highest" duty of care on the part of the carrier.[12] They are careful, however, to limit their holdings to the particular facts before them, thereby forestalling possible abuse of the doctrine through overgeneralization. An opinion by the Tenth Circuit Court of Appeals subsequent to the instant case confirms the applicability of the rule, although indicating that it may sometimes not be of much help to the plaintiff.[13]

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of the Doctrine of Res Ipsa Loquitur, 22 Ill. L. Rev. 724 (1928); Carpenter, The Doctrine of Res Ipsa Loquitur, 1 Univ. Chi. L. Rev. 519 (1934); Res Ipsa Loquitur: Its Nature and Effect, 3 Univ. Chi. L. Rev. 126 (1935); 167 A.L.R. 658 (1947); 153 A.L.R. 1134 (1944); 58 A.L.R. 1494 (1928).

[8] Johnson v. Western Air Express Corp., 45 Cal. App. 2d 614, 114 P. 2d 688 (1941) (crash in bad weather, specific negligence averred); Galer v. Wings, Ltd., 47 Man. Rep. 281 (K.B. Manitoba, 1938) (specific negligence averred); Goodheart v. American Airlines, Inc., 1936 U.S. Av. Rep. 177 (Sup. Ct. Nassau Cty. N.Y., 1936) (introduction of evidence on specific acts of negligence); McCusker v. Curtiss-Wright Flying Service, Inc., 269 Ill. App. 502 (1933) (plaintiff made out prima facie case even without doctrine); State ex rel. Beall v. McLeod, 1932 U.S. Av. Rep. 94 (Md. Super. Ct. Baltimore, 1932) (proceeding formally based upon violation of a federal safety statute); Hagymasi v. Colonial Western Airways, Inc., 1931 U.S. Av. Rep. 73 (N.J. Sup. Ct., 1931), aff'd 10 N.J. Misc. 1118, 162 Atl. 591 (1931) (specific negligence averred); Law v. Transcontinental Air Transport, Inc., 1931 U.S. Av. Rep. 205 (D.C. Pa., 1931) (evidence introduced as to prudence of pilot's judgment under adverse weather conditions).

[9] Smith v. Pacific Alaska Airways, Inc., 89 F. 2d 253 (C.C.A. 9th, 1937), cert. den. 302 U.S. 700 (1937); Curtiss-Wright Flying Service, Inc., v. Glose 66 F. 2d 710 (C.C.A. 3d, 1933), cert. den. 290 U.S. 696 (1934), aff'g Glose v. Curtiss-Wright Flying Service, Inc., 1933 U.S. Av. Rep. 228 (D.C. N.Y., 1932); Kamienski v. Bluebird Air Service, 321 Ill. App. 340, 53 N.E. 2d 131 (1944), aff'd 389 Ill. 462, 59 N.E. 2d 853 (1945); Rainger v. American Airlines, 1943 U.S. Av. Rep. 122 (Cal. Super. Ct., 1943); Malone v. Trans-Canada Airlines, 1942 O.R. 453, 3 D.L.R. 369 (Ont. App., 1942); Fosbroke-Hobbes v. Airworks, Ltd., [1937] 1 All E. R. 108 (K.B., 1936); Thomas v. American Airways, Inc., 1935 U.S. Av. Rep. 102 (D.C. Cal., 1935); Smith v. O'Donnell, 5 P. 2d 690 (1931), rev'd on other grounds 215 Cal. 714, 12 P. 2d 933 (1932); Seaman v. Curtiss Flying Service, Inc., 231 App. Div. 867, 247 N.Y. Supp. 251 (1930).

[10] Smith v. Whitley, 223 N.C. 534, 27 S.E. 2d 442 (1943); Boulineaux v. City of Knoxville, 20 Tenn. App. 404, 99 S.W. 2d 557 (1935); Allison v. Standard Air Lines, Inc., 1930 U.S. Av. Rep. 292 (D.C. Cal., 1930), aff'd 65 F. 2d 668 (C.C.A. 9th, 1933); Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 180 N.E. 212 (1932). Evidently the same federal court in California both approved and disapproved of the doctrine.

[11] In England there is no difference, regarding the safe carriage of passengers, in the duties and liabilities of common carriers as compared with those of private carriers. Shawcross and Beaumont, Air Law § 342, at 182 (1945).

[12] Wilson v. Colonial Air Transport Co., 278 Mass. 420, 425, 180 N.E. 212, 214 (1932).

[13] Bratt v. Western Air Lines, Inc., 169 F. 2d 214 (C.C.A. 10th, 1948). The plaintiff's error in relying on a structural defect to indicate specific negligence enabled the circuit court to hold

Even in the absence of any carrier-passenger relationship, plaintiffs have successfully invoked res ipsa loquitur in many plane accident cases.[14] In view of the stricter standard of care required of common carriers toward passengers, these decisions should constitute persuasive precedents in actions like the instant case.[15]

Courts opposing application in the carrier-passenger cases tend to agree that "it [is] common knowledge that airplanes do fall without the fault of the pilot."[16] They doubt, as a matter of the balance of probabilities, that the cause of an unexplained accident would be the carrier's negligence rather than some cause beyond its control. Although recent government statistics indicate that most crashes are still due to something other than the *pilot's* negligence,[17] a carrier can of course be negligent even where its pilot has used all due care. Nonetheless, though railroad accidents are also often the result of causes beyond the carrier's control,[18] the doctrine has from the outset been strictly ap-

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non-prejudicial an erroneous trial court instruction that the plane's pilot is presumed to have exercised due care for his own welfare. A verdict for the defendant was held to be supported by some evidence, although it would seem clearly wrong on the facts.

[14] The following cases approve the doctrine: Kadylack v. O'Brien, 1941 U.S. Av. Rep. 8 (D.C. Pa., 1941) (boy swimmer killed in plane's emergency landing); Genero v. Ewing, 176 Wash. 78, 28 P. 2d 116 (1934) (doctrine given minimum inferential effect and verdict for defendant upheld where unsecured empty plane crashed into hangar on emergency field); Stoll v. Curtiss Flying Service, 1930 U.S. Av. Rep. 148 (N.Y. Sup. Ct., 1930), aff'd 236 App. Div. 664, 257 N.Y. Supp. 1010 (1932) (crash of private carrier killing all aboard); Miller v. English, 43 S.W. 2d 642, 1932 U.S. Av. Rep. 153 (Tex. Civ. App., 1931) (minor killed after crash following pilot's stunting; doctrine approved but held inapplicable because of averments of specific negligence); Sollak v. New York, 1929 U.S. Av. Rep. 42 (N.Y. Ct. Cl., 1927) (plaintiff injured when his automobile was struck by plane).

The following cases, directly or by implication, disapprove the use of the doctrine: Deojay v. Lyford, 29 A. 2d 111 (Sup. Jud. Ct. Maine, 1942) (flagman struck as plane landed); Cohn v. United Air Lines Transport Co., 17 F. Supp. 865 (Wyo., 1937) (skilled pilot invited to test flight assumed risk of crash); Parker v. Granger, 4 Cal. 2d 668, 52 P. 2d 226 (1935), cert. den. 298 U.S. 644 (1935) (both airplanes colliding in midair were not under the exclusive control of the defendant); Herndon v. Gregory, 190 Ark. 702, 81 S.W. 2d 849 (1935), dissenting opinion 82 S.W. 2d 244 (1935) (guest was traveling in private plane with an inexperienced pilot); Rochester Gas & Electric Co. v. Dunlop, 148 N.Y. Misc. 849, 266 N.Y. Supp. 469 (1933) (plane crashed into plaintiff's steel tower; recovery allowed in trespass).

Finally, there are some interesting cases where the cracked-up plane was equipped with dual controls. All except one disapprove the use of the doctrine: Morrison v. LeTourneau, 138 F. 2d 339 (C.C.A. 5th, 1943); Towle v. Phillips, 180 Tenn. 121, 172 S.W. 2d 807 (1943); Madyck v. Shelley, 283 Mich. 396, 278 N.W. 110 (1938); Michigan Areo Club v. Shelley, 283 Mich. 401, 278 N.W. 121 (1938); Budgett v. Soo Sky Ways, Inc., 64 S.D. 243, 266 N.W. 253 (1936). The exception is McInnerny v. McDougall, 47 Man. Rep. 119 (K.B. Manitoba, 1937), where res ipsa loquitur was held proper because the pilot's failure to disconnect the dual controls indicated negligence on his part.

[15] The district court in the instant action recognized such cases as precedent by citing six of them in support of its decision. 76 F. Supp. 940, 945 (1948).

[16] Smith v. Whitley, 223 N.C. 534, 536, 27 S.E. 2d 442, 443 (1943).

[17] Sweeney, Report to the Civil Aeronautics Board of a Study of Proposed Aviation Liability Legislation, exhibits 22, 31 (1941).

[18] See generally ICC, Summaries of Accident Investigation Reports.

plied in such cases.[19] There the courts have presumably felt that common carriers, unlike the "reasonable and prudent man," should be held responsible for *any* causally-connected negligence, and that their accidents would not have occurred but for *some* neglect on their part. Furthermore, such carriers can always present full compliance with all prescribed duties as a defense.

Res ipsa loquitur or a like rule has not been applied in actions for wrongful death or injury to passengers on ocean carriers.[20] The courts apparently wanted to protect the shipping industry from excessive losses in its infant, risky stage,[21] and an early case suggested that similar policy reasons should apply to the aviation industry.[22] Although the court in the instant cases dismissed the suggested analogy by referring to the special nature of admiralty law, the comparison is well founded. The loss of a single plane, like that of a ship, commonly represents a substantial portion of the carrier's transport equipment, which is not true for rail carriers in case of the loss of part of a train.[23] Conditions affecting aviation often resemble those operative in shipping and are quite different from those affecting rail carriers. In the formative years of admiralty law ships were subject to weather hazards similar to those now affecting planes, to which other carriers are relatively immune. Also, major accidents in the air as well as on water often leave no survivors and result in complete destruction of the plane or ship, making it doubly difficult, if not impossible, for the defendant to prove that he has exercised the highest degree of care.[24] Railroads, on the other hand, usually experience little difficulty in showing the causal intervention of forces beyond their control, as they can secure evidence from survivors and/or the wreckage itself. Finally, planes resemble ships in their accepted disregard for political boundaries and are therefore subjected to extensive federal and inter-

[19] The doctrine, not yet expressed in Latin, was applied to railroads in England as early as 1844. Carpue v. London & Brighton Ry. Co., [1844] 5 Q.B. 747.

[20] Davis, Aeronautical Law 294 (1930).

[21] Modern engineering accomplishments, particularly wireless communication and radar, have of course made short shrift of the traditional "perils of the sea" doctrine, but the precedent is still there, supported by statutory enactment. 37 Stat. 445 (1893), 46 U.S.C.A. § 192 (1928).

[22] Herndon v. Gregory, 190 Ark. 702, 81 S.W. 2d 849 (1935).

[23] A new Constellation plane, comparable in seating capacity to a bus, cost about $800,000 in 1946. Cohu, The Paradox of the Airlines, 15 J. Air Law 307 (1948). A new streamliner train, carrying about twenty times as many passengers, requiring a fraction of the maintenance, and lasting several times the useful life of the plane, then cost about $1,500,000. In most train wrecks, only part of the train is damaged. American Airlines, the largest domestic air carrier, has a total of 154 planes (of which only its forty-seven DC-6's are not obsolete) and lists total assets of $121,315,020. Pennsylvania Railroad, the biggest domestic rail carrier, has 4,526 locomotives and 5,989 passenger cars (not to mention hundreds of thousands of freight cars) and lists total assets of $2,220,597,888. Moody's Industrials 1177, 1178 (1948); Moody's Steam Railroads 771, 779 (1948).

[24] This is now more true for planes than for ships, because of their more sudden and complete destruction in an accident. Few ships are now lost without survivors, and usually a sinking ship has sufficient time to relay information by radio as to the cause of the accident.

national regulation. Compliance with such regulation narrows the field of the carrier's possible negligence as compared to that of carriers not so regulated.[25] Hence the instant court's reliance on the railroad analogy to support its broad language seems questionable, even though airlines compete directly with first-class rail travel.[26] However, the Warsaw Convention on international civil aviation, while limiting liability for passenger death damages to a reasonable amount,[27] has established a sort of statutory res ipsa loquitur applicable to international flights.[28]

Domestic commercial airlines are thoroughly controlled by the federal government, which considers their welfare a matter of national concern[29] and subsidizes their operations not only by direct grants[30] but also by the establishment of auxiliary services[31] and even by the suppression of price-cutting competition.[32] A general imposition of res ipsa loquitur would therefore amount to judicially-legislated disposition of the tax dollar. For under such a development the government would have either to increase its subsidy to keep the airlines in business or to reinsure aviation insurance underwriters in order to avoid premium rates which the industry could not meet.[33] Without legislation requiring such a result, it would be unfair to impose a liability of possibly several million dollars[34] upon an airline as the result of an accident in which the carrier

[25] Some of these arguments seeking to show the similarity between aviation and shipping and thereby proposing the application of like liability rules might be considered, apart from the analogy, as providing strong grounds for, rather than against, the application of res ipsa loquitur.

[26] In 1947, the airlines accounted for 32.7 per cent of all first-class travel, on the basis of passenger-miles. 48 Aviation Week, No. 15, at 44 (Apr. 12, 1948).

[27] $8,291.87 (125,000 gold francs at par of $.066335). Art. 22, c. iii, §§ 1, 3 (ratified by United States Senate June 15, 1934).

[28] "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Ibid., § 17.

"The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Ibid., § 20.

[29] See "Brewster Report," National Aviation Policy, S. Rep. 949, 80th Cong. 2d Sess. (1948); "Survival in the Air Age: A Report by the President's Air Policy Commission" (Finletter Report), 1948 U.S. Av. Rep. 252.

[30] Civil Aeronautics Act § 406 (b), 52 Stat. 998 (1938), 49 U.S.C.A. § 486 (b) (Supp., 1947); see Allocation of Air Transportation Costs in Determining Domestic Mail, Passenger, and Cargo Rates, 15 J. Air Law 354 (1948).

[31] Civil Aeronautics Act §§ 302–5, 52 Stat. 985, 986 (1938), 49 U.S.C.A. §§ 452–55 (Supp. 1947). A program proposed by the Radio Technical Commission for Aeronautics for installation of an ultramodern system of all-weather navigation, landing aids, and airways traffic control, to cost $1,113,000,000 over a period of fifteen years, has been recommended to Congress. Brewster Report, 1948 U.S. Av. Rep. 252, 272.

[32] Civil Aeronautics Act §§ 401, 411, 610, 52 Stat. 987, 1003, 1012 (1938), 49 U.S.C.A. §§ 481, 491, 560 (Supp., 1947); see N.Y. Times, p. 27, col. 3 (July 25, 1948).

[33] Thompson, Some Problems in Aircraft Insurance, 1946 Ins. L. J. 451, 720.

[34] Thompson, Conflict of Laws and International Carriage, 1948 Ins. L. J. 627.

may not have been negligent at all. Nor is there much merit in the thesis that an imposition of the doctrine would force the airline to exercise a greater degree of care, since, in the absence of any liability, an airline on which a crash had occurred would still experience a huge drop in revenue due to the disturbed confidence of the public.[35] This alone would seem sufficient to insure a maximum of precaution. In addition, if an airline has too many crashes the Civil Aeronautics Board may put it out of business by revoking its "certificate of convenience and necessity."[36] Finally, as the CAB's report on the instant crash[37] indicates, many air safety measures are controlled by agencies other than the individual airline. Other carriers fully control their own safety systems even though they may be required to comply with statutory regulations.

On the other hand, the air passenger must be protected against risks which he does not assume in flying, and it is the accepted view that a crash is one of the non-assumed risks. Perhaps the most workable solution might be found in federal legislation[38] automatically imposing liability on a carrier for harm done to a passenger in flight unless the carrier proves its exercise of the highest degree of care, but limiting the total damages payable by the carrier for a single crash to some given sum times the number of seats in the plane.[39] This manner of limiting damages is preferable to setting a maximum liability for each passenger,[40] since under the latter method recovery in particularly meritorious actions might be unduly low while actions of little or no merit might result in recovery of the full amount because of the tendency of the maximum to become the norm.[41] In order to do justice to all claims arising out of an accident, however, the method here advocated must either require the defendant to bring in all possible claimants as third-party plaintiffs[42] or provide that the time during which a claim may be brought be limited to some such period as one year, at

[35] 48 Aviation Week, No. 8, at 97 (Feb. 23, 1948): "In June, 1947, about 50,000 fewer passengers were handled by the airlines than in the previous month." This was attributed almost entirely to the crashes on May 29, 1947 (LaGuardia Field, United Air Lines DC-4, 43 killed), May 30, 1947 (Pt. Deposit, Md., Eastern Air Lines, 53 killed), and June 13, 1947 (the crash resulting in the instant action).

[36] Civil Aeronautics Act § 401, 52 Stat. 987 (1938), 49 U.S.C.A. § 481 (Supp., 1947).

[37] CAB, Accident Investigation Report SA-146, released Nov. 19, 1947.

[38] State regulation of air carriers has been unanimously rejected as unable to cope with the problem, primarily because of the failure of the proposed Uniform State Law for Aeronautics of 1922, 11 Unif. Laws Ann. (1938).

[39] For example, if the sum were $10,000, and the plane had fifty seats, the maximum liability of the carrier would be $500,000. Ideally, this sum should also include claims in trespass for damage to ground property resulting from the crash.

[40] As proposed in H.R. 532, 79th Cong. 1st Sess. (1946).

[41] See Reiber, Some Aspects of Air Carrier's Liability, 11 Law & Contemp. Prob. 524 (1946).

[42] Of course claimants would have the right to refuse to sue, but in that case their claims should be permanently barred. In the absence of contributory negligence by one of the claimants, claims arising out of a plane crash would seem to be best disposed of by class suits, as the cause of action is identical for all. However, claimants whose real property has been damaged by the crash might find it more advantageous to bring actions in trespass.

the end of which all judgments rendered, if their total exceeds the maximum permissible amount, would be adjusted on a pro-rata basis.

The advantages of statutory imposition of liability are: 1) The issues would be submitted to public debate prior to enactment by Congress.[43] 2) A passenger-plaintiff would be vested with a legal right more advantageous to him than res ipsa loquitur as applied under the more limited interpretations, since the risk of non-persuasion of the jury would be shifted to the defendant. 3) Airlines, knowing what is demanded of them, would more readily settle claims out of court. 4) Aviation insurance underwriters, protected by the maximum liability provision from huge potential losses which unrestricted application of the doctrine might impose upon them, would not have to seek greater premiums or government reinsurance but might even lower their charges, thus encouraging more air transportation by allowing airlines to reduce fares.[44] 5) If for any reason such a law should not prove workable, it can be repealed or amended far more easily than a well-established common-law precedent.

Although the findings of the CAB investigation in the instant case[45] may not be admitted as evidence for obvious reasons,[46] their tenor supports the court's decision in this case. But as precedent this and similar decisions should be narrowly construed and confined to the particular facts of their cases. While, in the absence of suitable legislation, it may be necessary to invoke res ipsa loquitur in some actions arising out of air disasters, the doctrine should be applied only where all the circumstances, including available statistics on the causes of similar previous crashes, indicate that the likelihood of the defendant's negligence clearly outweighs all other possibilities.

FRANCHISE "VALUE" IN EMINENT DOMAIN PROCEEDINGS

In connection with the wartime expansion of the Brooklyn Navy Yard, the United States condemned some seventy acres of land in the borough of Brooklyn. For the most part, the taking by the government concerned privately owned real estate, and the various condemnation proceedings in respect to such property raised no noteworthy questions. Also involved, however, were municipal facilities owned by the city of New York and certain property rights of two

[43] The occasional advantages of open legislation are pointed out by Miller, A Law is Passed —The Atomic Energy Act of 1946, 15 Univ. Chi. L. Rev. 799 (1948).

[44] Barnes, Economic Role of Air Transportation, 11 Law & Contemp. Prob. 431 (1946).

[45] "The Board finds that the probable cause of this accident was the action of the pilot in descending below the minimum enroute altitude under conditions of weather which prevented adequate visual reference to the ground. A contributing cause was the faulty clearance given by Airway Traffic Control, tacitly approved by the company dispatcher, and accepted by Flight 410." CAB, op. cit. supra note 37, at 8. The summary, however, sounds much more impressive than the facts in the report seem to justify.

[46] Civil Aeronautics Act § 701, 52 Stat. 1012 (1938), 49 U.S.C.A. § 581 (Supp., 1947).

public utility companies which had been engaged in supplying gas and electricity to the former residents of the taken area. The facilities taken from the city consisted of segments of three public streets, one containing a bridge and a crosstown trolley line, and two parcels of land under a canal and boat basin. The taking of the land and the bridge apparently did not require any replacements or adjustments by the city, but the taking of the streets made it necessary to lay new connecting switches and reroute the crosstown trolley over existing tracks with an increased operating distance of slightly more than one-half mile. Both utilities maintained distribution facilities within the taken area. Those of the gas company consisted of underground gas mains with small pipes running from the mains into buildings within the area. The electric company maintained underground conduits, cables, transformers, and service connections to buildings supplied with electricity. In a realistic sense the taking involved only a cutting off of both distribution systems at their points of entry into the taken area. There they were connected to government-owned distribution facilities of the naval base, so that in fact the United States was substituted as consumer of the utilities' services in the area. In light of the petition of taking, in which the government stated its intention to acquire "an estate in fee simple absolute . . . all improvements thereon and all rights, easements and appurtenances thereto, except removable fixtures. . . ,"[1] both companies were given permission to salvage or remove all their individual installations. Although the gas company failed to do so, the electric company removed all its transformers and some of its cables, stipulating that the removal was not a waiver of any claim for compensation for facilities not removed. Thus the taking required no special outlays to fulfill the franchise obligations in the new situation.

Municipal ownership and the granting of franchises are essentially similar methods adopted by communities to provide necessary public services. Thus, as alternatives to the Brooklyn arrangement, facilities for public transportation are often provided by private companies while gas and electricity are furnished through publicly owned plants. Yet this basic similarity was not recognized in the condemnation proceedings. In dealing with the taking of city property, both the federal district court[2] and the circuit court[3] in the instant case held the condemnee entitled only to the actual cost of necessary substitute facilities. But in the case of the utilities both courts felt compelled to proceed on the assumption that the franchises were property which had in some way been taken and for which value must be paid. They differed only as to the proper method of valuation, the lower court issuing an order for a substantial award[4] which was reversed and remanded on the ground that evidence excluded by the district court indicated the absence of any loss to either utility company.[5]

[1] United States v. 25.4 Acres of Land, 65 F. Supp. 333, 334 (N.Y., 1946).

[2] United States v. 25.4 Acres of Land, 71 F. Supp. 255 (N.Y., 1947).

[3] United States v. City of New York, 168 F. 2d 387 (C.C.A. 2d, 1948).

[4] United States v. 25.4 Acres of Land, 71 F. Supp. 248 (N.Y., 1947).

[5] United States v. Brooklyn Union Gas Co., 168 F. 2d 391, 398 (C.C.A. 2d, 1948).

In limiting the city's award to the cost of the switches and denying any compensation for the cost of operating the longer trolley line,[6] the circuit court relied on evidence showing that the increased costs had been more than compensated for by an increase in net revenue per mile since the date of the rerouting. Judge Clark's opinion described the city as being "in the business not of making profits, but of supplying public needs," and went on to emphasize the well established rule that in such cases the measure of compensation is the actual cost of providing the necessary substitutes. Therefore, since "there has been no convincing evidence of any annual recurring loss, the award was properly denied."[7] The "annual recurring loss" which the court found absent in the present case—an increase in costs resulting from the taking not compensated for by a corresponding increase in revenue—might arise in either of two fact situations: one where the total revenue after the taking was less than the total costs, the other where the total revenue exceeded even the increased total costs. A logical application of the rule that public condemnees are to receive the cost of substitute facilities would seem to call for an award in both cases, in spite of the fact that in the latter situation the city is not actually out of pocket.

In the companion proceeding against the public utilities the district court held that the distribution facilities which the companies had maintained within the taken area, as well as the franchise rights to operate them, were elements which constituted compensable property at the date of the taking. The court refused to consider the evidence showing that the United States had subsequently consumed more of the condemnees' gas and electricity for use on the naval base than had been sold to private consumers located therein prior to the taking. On appeal Judge Clark, again speaking for the circuit court, held that the evidence of the subsequent profits should have been considered, "not as a standard of value in itself, but for its bearing upon the prospective value at the time of the taking." The opinion of the lower court was reversed and the action was remanded for further proceedings in accord with the proposition that "the award is not to exceed the amount of the loss; and if there has been none as to the franchise, then there should be no award for its asserted impairment."[8]

It was the contention of the United States that, since the two defendant utilities performed public services similar to those performed by the city in the companion case, the award in both cases should be only the actual cost of providing the necessary substitute facilities elsewhere in light of the change made by the taking. But although Judge Clark conceded that there was much logic

[6] Only nominal awards of one dollar each were made for the parcels of land represented by the streets and the land under water, the taking of which necessitated no substitute facilities. Since the taken bridge had been built in 1936 with federal funds, the city was allowed only the sum of $5,303, which represented the salvage realized by the United States. Also allowed was the cost of replacing a high tension electric power line for the operation of subway and feeder lines less the salvage value to the city of the old line.

[7] United States v. City of New York, 168 F. 2d 387, 391 (C.C.A. 2d, 1948).

[8] United States v. Brooklyn Union Gas Co., 168 F. 2d 391, 398 (C.C.A. 2d, 1948).

in the government's contention, he insisted that while the utilities performed a public service they were also in business for the profit of their stockholders. "Moreover, the law seems to be too well settled for change now that the taking of a public franchise is the taking of property for which compensation must be paid."[9] But well-settled though this rule is, the similarity between the situations of the city and the utility companies in the instant cases casts considerable doubt on the general validity of the distinction.

The term "franchise" has seldom received adequate definition in condemnation cases. Realistically, a public utility franchise is a grant by a community according certain privileges for use in furnishing essential public service. Reduced to its simplest form, a franchise merely permits the grantee to use and occupy certain public places in order to provide the designated services. It usually includes various terms and conditions with which the utility agrees to comply. Underlying the granting of a franchise is the notion that the use of these facilities is authorized by the public because essential to the public welfare and convenience. Once a utility company has undertaken to provide such service it is not free to abandon its undertaking without the consent of the public authority.[10]

Historically, most franchises prescribed specific rates at which utilities' services were to be furnished. The franchise was then the community's only instrument of regulation[11] and was at the same time a true grant of monopoly. The monopoly position thus accorded to utilities, coupled with the typical inelastic demand for their services, of course accounted for the franchise rate provisions.

For various reasons, however, the franchise proved an increasingly inadequate instrument for handling the problem of rates, and the result was an adoption of state regulation "based on the general sovereign right to regulate in the public interest rather than upon the contractual instrument of the franchise."[12] This function came to be performed largely by state commissions, and the significance of franchise rate provisions disappeared. Today the franchise is practically reduced to a grant of the right to occupy public facilities in order to distribute services which the state commission has authorized by a certificate of public convenience and necessity.

The concept of a franchise as a contract is the basis of the surviving eminent domain doctrine that a franchise is a sort of vested right to a certain market for which value must be paid when it is affected by a condemnation. Insofar as the franchise has been a regulatory device, there has never been any justifica-

[9] Ibid., at 394.

[10] Broad River Power Co. v. South Carolina, 281 U.S. 537 (1930), supplemental opinion rendered 282 U.S. 187 (1930).

[11] Bauer, The Public Utility Franchise, Its Functions and Terms under State Regulation 1 (1946).

[12] Ibid., at 2.

tion for this doctrine. Only the grant of monopoly in the early franchises made it reasonable. With this monopoly element nullified by state regulation,[13] the theory that the taking of a public franchise is the taking of property for which compensation must be paid becomes clearly illogical, finding support only in the opinion that it is "too well settled for change now."[14] The court's adherence to that theory in the *Brooklyn Union Gas Company* case is the more surprising in view of an available ground for denying compensation which would have been equally consistent with eminent domain doctrine.

The Constitution requires just compensation only for property actually *taken*. Thus, the courts distinguish between the "taking" of property, which necessitates an award, and the "damaging" of property, which does not.[15] Generally, a mere reduction in the value of property to its owner is not sufficient to constitute a taking. The property itself must be appropriated to the condemning government. On the other hand, a damaging is held to imply not only that the person responsible for the damage has received no benefit from the act but also that the owner retains the use of his property in its now impaired condition. Since the petition of taking specifically exempted the removable fixtures, the court might have held in the instant case that the utilities suffered nothing but a profitable change of customers. It would have been most difficult to maintain that the franchises accorded a property right to deal with specific customers. And as far as the "legal interest"[16] of the utility companies was concerned, nothing was taken but the obligation to provide their services to the *former* customers, an obligation of which customers may or may not take advantage as they prefer. This rationale would have avoided the issue of franchise value, at the same time furnishing a more satisfactory basis for the denial of compensation than the theory employed by the court.

Once the court had accepted the premise that a franchise is compensable property, it was faced with the problem of finding the "value" of "taken property" which was in fact earning the utilities more than it had before the taking. The franchise was valued by the court not as a disembodied property right inherently valuable in itself but rather as a commercial entity to be appraised by judgment of the "capacity of the franchise to produce earnings." Application

[13] Such monopoly advantages as public utilities now enjoy stem not from their franchises but from the operation of the doctrine of public convenience and necessity in the granting of certificates by state commissions and from partial ineffectiveness of rate regulation by these commissions.

[14] United States v. Brooklyn Union Gas Co., 168 F. 2d 391, 394 (C.C.A. 2d, 1948).

[15] "There is a marked distinction between the instances where the State appropriates . . . business . . . intending to continue its operation as a public service enterprise . . . and those instances where the State desires the property and not the business." Banner Milling Co. v. State, 240 N.Y. 533, 539, 148 N.E. 668, 670 (1925); see Mitchell v. United States, 267 U.S. 341 (1925); Omnia Commercial Co. v. United States, 261 U.S. 502 (1923).

[16] "This is not an award for business losses . . . but is a means of finding present worth in a legal interest. . . ." United States v. Brooklyn Union Gas Co., 168 F. 2d 391, 395 (C.C.A. 2d, 1948).

of this standard was to be made by an "exercise of business judgment to determine whether there has been an impairment of productiveness, and if so, by how much."[17] Given the assumption that property had been taken, this was a sound method of valuation. Because no "market price" is available by which to evaluate the franchise as a disembodied right, the "worth [of the franchise] as a producer of earnings" is admissible as evidence of value. As a partial limitation on this type of valuation, the court implied that business judgment is to be applied rather conservatively on the ground that it involves too many uncertain premises.[18]

But the real flaw in valuing a franchise upon its capacity to produce earnings lies in the fact that a taking which causes a "reduction of earning capacity" within the area taken compels an award for the value of the franchise. Suppose an area in which a substantial amount of electricity had been supplied to rural homes were taken by the government for use as an artillery range. Under the circuit court's reasoning such a loss of earning power could not logically be excluded as evidence of the value of the taken franchise, even though the present-day function of a utility franchise makes the granting of such an award clearly objectionable. Under the facts of the present case, the court's approach produced a sound result—denial of compensation. Where a loss is established, however, equally sound results can be achieved only by eliminating the premise that a franchise is valuable property. Direct attack on this premise in the present case would have prevented future difficulty in distinguishing the *Brooklyn Union Gas Company* reasoning to prevent awards to franchise holders who had suffered business losses because of a taking.

[17] The court was thus rejecting the stand taken by the Supreme Court in Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 690 (1897), that such a contract right "is a mere incident to the tangible property. . . . Its impairment . . . is a mere consequence of the appropriation of the tangible property."

[18] The court suggested gross receipts, the actual volume of sales past and present, while forecasts of future net earnings based on variables unrelated to the taking were rejected.

BOOK REVIEWS

The Meaning of Treason. By Rebecca West. New York: The Viking Press, 1947. Pp. 307. $3.50.

Treason is the measure of many things today. The rules defining it are among the few great rules of law of any society. Treason, by the scope of its definition and application, measures the effective difference between police state and democracy. Treason, by the frequency of its appearance, is a measure of the health and well-being of a society. Treason, because it is perhaps the most fundamental of crimes, is also a measure of our understanding of the deviant impulses and pressures that appear to make law necessary.

It is with the last of these things that Miss West is especially concerned in her study of twenty or so men brought to trial in England as traitors at the end of World War II. The result is a superb book contributing to law, to psychology, to journalism, and, with the greatest distinction, to the contemporary writing of the English language.

Treason's harvest is not quite what we should have expected. The Germans appear to have placed a high price on inducing British treachery at even the lowest levels.[1] They concentrated on the weak and the uninformed and alternately coerced, bribed, and seduced. A few who were very young, or eccentric, or had genuine German ties succumbed. In one case the man was a traitor technically only because the overshrewd Germans, suspecting him as a spy, delayed so long on his application for German citizenship.

If this were all, the study of the trials would serve only to corroborate the remarkable morale of the English during the war, and would be a study only of the pathetic and the eccentric.

But there are three other cases not so easily understood: William Joyce, the Lord Haw-Haw who, simply by broadcasting, may well have made himself the most hated traitor in English history; John Amery, son of a distinguished family, who moved unsteadily from a career as playboy to aide and gun runner for Franco and then to ally of the Germans in the effort to bribe British prisoners to enlist in the British Free Corps; and Dr. Allan Nunn May, a distinguished scientist who gave or sold some atomic bomb data to a Russian agent.

It is, I think, the one flaw of the book that Miss West did not make a more coordinate study of these three. We get only a few pages on May which do not take us far enough for the intended comparison of Communist and Fascist to be effective.

We get some thirty pages on Amery, beautifully and sensitively done, but these again are not enough to give us a clue as to how so happy an environment could produce so perverse a son. It may be that at this stage of our knowledge of these things no one could do more, and Miss West's final comment on Amery is perhaps the only

[1] There is the brief but fascinating suggestion that the organization of British treachery had become something of a racket for many Germans who professed to be experts in this form of psychological warfare (p. 131).

appropriate one. She is describing the conclusion of the trial. The old judge, "whose age was crisp as a fine winter night with a fierce wit on his tongue and a fiercer wit on his face," lectured Amery at some length before passing sentence and came to comment on the fact that in Amery's trips to the POW camps some of the prisoners had warned him he was committing high treason:

> It was not a point worth making, so far as Amery was concerned. . . . Yet, if what the Judge said had little application to Amery, he seemed to say it because his mind had been shocked into flight underground to some place near the sources of our general destiny. The Judge said slowly, with accusation and querulous wonder in his voice, "They called you traitor and you heard them."

It is otherwise with the handling of Joyce. Here there is a rich and full study. Miss West has spared no effort to collect bits from the crazy quilt of his life, and she has speculated long about him. It is the report on Joyce that is the solid achievement of the book, and Miss West quite persuades us that a study of Joyce is close to the heart of the appeal of fascism.

Joyce is the one traitor of stature. Throughout the difficult months of his trial he conducted himself with extraordinary serenity and integrity. His statement dictated immediately after his capture, which Miss West quotes in full, is an unusually able document in view of his circumstances. He was a hard worker, scrupulous about his personal debts, an extraordinary public speaker, a good leader and administrator. He was a man of wit and some education, a successful teacher, a loving husband.

He was also insatiably ambitious. But he had about him an "ineradicable oddity" and a curious air of illiteracy for an educated man. Miss West repeatedly muses over this indefinable lack in Joyce's personality which appears to have meant in English society that he could never belong.

His life was full of erratic little pieces. The most hated of British traitors was born in Brooklyn. He fought with the British against his own Irish kinfolk in the Irish rebellions. For many years he insisted that social evenings end with a singing of the British national anthem. In the end he was captured only because he was moved to an unnecessary courtesy to two British officers who were looking for kindling wood.

Then there is the darker side. He loved street fighting and military trappings; he was addicted to the raincoat, "that extravagant present of the Nazis to the psychologist." He was an early and enthusiastic visitor to Nuremberg. And in his broadcasts he had a way of rolling on his tongue with a singular delight figures as to the English dead and the lost English tonnage.

Miss West offers us several hypotheses as to William Joyce. One is that he early and irrevocably became habituated to intrigue and violence because of his family's connections with the Irish rebellions. Another is simply that he was a man with a fierce ambition which he recognized could never be satisfied within the traditional framework of British life. But the talk of "ineradicable oddity," as though Joyce wore his flaw on his sleeve for all to see, is not altogether persuasive. Nor does the ambition of many men remain so stubbornly incommensurate with their real possibilities.

A third hypothesis recognizes the ambivalence in Joyce's attitude toward England and offers in a stunning summary the psychoanalytic insight into the profound and mysterious impact of infancy:

> But they put the child down when it wants to be taken up, they will not go on giving food till the limits of greed are reached, they sometimes move it into colder airs; and for these hostile acts they are hated, each time with a final and desperate hatred because the child has

not enough experience to know that the hostility will not continue forever. At that stage the parents are the environment, they are authority; and the conceptions of environment and authority are coloured throughout our adult lives with the unrestrained emotions of cooing and squalling infancy. Most parents and children contrive to gentle their relationship by tolerance of each other's wills so that it serves them well, and most citizens make the claims of the state and their individualities balance on their books. But there are those who never persuade the love and hatred they feel for their parents to sign a truce; and these often find themselves compelled to spend their lives in love and hatred of the society of which they are a part, striving to make it more beautiful and noble, but insisting that the prerequisite of its reforms is its destruction.

The most extreme form of this is the revolutionary, and Joyce was "the sublime example of this extreme type."

Still another hypothesis, set forth at the conclusion of the Joyce discussion, is more intricate and has a marked similarity to the thesis Erich Fromm propounds in *Escape from Freedom* as an explanation for fascism. There are many growths of the Fascist stem, Miss West begins. There are those simple ones without a sense of process who believe that all benefits can be readily obtained and cannot understand who it is that keeps them from their share. But Joyce was not one of these. There is the malcontent professional soldier or the misfit aristocrat, like Mosley, but Joyce again was not one of these. He was rather, she continues, a new type of fascist. The advent of democracy had deprived him of his alibi for not attaining power. It must be that he failed because he did not please, was not liked. Here Miss West suddenly works out a striking characterization of fascism. And so "since William Joyce was not liked, he would drive out the element of liking from the governmental situation."

She pushes this speculation one step farther. Why was Joyce's appetite for political office so insatiable? She answers that because here alone today can the insecure man find a relationship, like the old relationship with God, one which cannot be qualified or questioned.

Therefore the man who would have been happy in the practice of religion during the ages of faith has in these modern times a need for participation in politics which is strong as the need for food, for shelter, for sex. It feeds his soul, it keeps it from the wind, it drives out that terrible companion loneliness.

There is finally the ironic insight into that extraordinary serenity at the trial.

It is possible that in these last days fascism had passed out of the field of his close attention; that what absorbed him was the satisfaction which he felt at being, for the first time in his life, taken seriously. It was at last conceded that what he was and what he did were matters of supreme importance.

The legal issues in the Joyce trial are of considerable interest in themselves.[8] The application in his case of principles of the law of treason involved equity in the classical sense. Mysteriously enough, Joyce had never become a British citizen although he had long professed to be one. As a consequence, his case turned on the bond of allegiance established by his holding an unexpired British passport when he first began to broadcast for the Germans.

There was widespread feeling among the English, lay and professional, that Joyce

[8] The final appeal is reported in Joyce v. Director of Public Prosecutions [1946] 1 All E. R. 186 [H.L.]. Porter, L.J., dissented solely on the issue of whether Joyce's use of the passport should not more explicitly have been left to the jury. Miss West has an interesting defense of the trial judge's instructions on this point at pages 45–46. The case is noted in 13 Univ. Chi. L. Rev. 362 (1946); 59 Harv. L. Rev. 612 (1946); 62 L.Q. Rev. 105 (1946).

should not have been convicted under the law. There is enough complexity to the legal issues involved to make us wonder, for at least a moment, whether despite the majestic and precise ritual of the trial, it was anything more than the community's revenge on a hated member.

Miss West handles the legal matters with competence, and the underlying moral judgment with eloquent indignation. Many English, she notes, had begun to say that Joyce was a vile little man but should not have hanged. They were doubly wrong, she insists. He was not vile but he should have been hanged. And when she has finished she has, I think, established both her points. As Joyce makes a claim to our attention in any study of fascism comparable to that of a Hitler, Goering, Goebbels, or Hess, so his trial is hauntingly similar to the Nuremberg trials. Here again is the question of whether the extension of law to the new case or the refusal to extend it would have been the greater affront to moral sensitivity.

It is something of a shock after reading this book to turn to a competent orthodox legal discussion of the case and realize how much of the color and meaning are lost in the process. It is not just the special flavor of treason that adds the dimension here; a reporter of Miss West's skill and perception could weave the same magic about a very large area of the law in our books. The law man cannot of course always study his law as poetry, but he should be indebted to Miss West for this reminder of how close to poetry, as well as to psychology, his law is.

Treason is the measure of many things today, but it remains a kind of mystery. Joyce merely broadcast; he did not fire a gun, drop bombs, kill. Yet he was more odious and more hated than the enemy, and the law says his crime was far the greater one. For Miss West and the English who were united by the suffering of the war, loyalty to one's own group was no idle phrase. In an illuminating comment at the start of the book she contrasts treason and incest: The one is a travesty of legitimate hatred as the other is a travesty of legitimate love. The ultimate fate and meaning of treason are for her, as she says at the close of the book, the misery and loneliness of deserting one's own for the stranger.

But incest and treason are conspicuous among the primitive taboos. Perhaps, in the end, treason also measures the gravest illness of our time because the loyalties against which it sins, even the best of them, are as yet too provincial and limited.

HARRY KALVEN, JR.*

The Illinois Business Corporation Act Annotated. Second edition. 2 vols. Chicago: Burdette Smith Co., 1947. Pp. xxi, xxi, 1281. $20.00.

The legal profession of the State of Illinois has every reason to be grateful to the members of the Corporation Law Committee of the Chicago Bar Association for having produced these magnificent volumes which are bound to be an almost indispensable *vade mecum* for every legal practitioner even remotely concerned with the formation, management, and dissolution of corporations governed by the law of Illinois. Apart from this, its primary and immediate significance, however, this work is of outstanding value to those who, like the present reviewer, are interested in the development of American corporation law in a more academic capacity. The student of comparative Company Law will find this work an almost inexhaustible source of information. It

* Assistant Professor of Law, University of Chicago.

will provide him with food for thought on many problems of legislative policy and technique, not only because of the novel and experimental nature of many of the provisions of the statutes, but also because the method of presentation adopted by the authors permits him to see these provisions as part of the living law of Illinois.

The first volume contains the Business Corporation Act of 1933, as amended, with a wealth of annotations. These annotations are not confined to an analysis of the decisions which have interpreted the Act and its predecessors. They give the legislative history of each section and, in many cases, the common-law background of its operation. Moreover, on many occasions, light is thrown on parallel legislation in other American states, and ample references are given to periodical and other literature. There follow fifty-five forms for use in connection with the Act. These forms are themselves annotated, and, apart from their practical value, make it possible for the reader to see how the statute is actually applied by lawyers and businessmen. In the second volume the General Not for Profit Corporation Act of 1943 is treated in a similar manner. The texts of the entire body of Illinois corporation statutes since 1872 is printed in full, and, an inestimable boon to the foreign reader, almost fifty opinions of the attorney general are reprinted in this volume. The General Index at the end deserves a special word of praise.

It so happened that, when the present writer received these volumes for review, a comprehensive scheme of Company Law reform had just been carried into effect in Great Britain, and it would have been impossible for the writer not to read this book in the light of the lively discussion which had accompanied the preparation and publication of the Report of the Committee on Company Law Amendment, 1945,[1] generally known as the Cohen Report, and the passing of the Companies Act of 1947[2] (now incorporated in the consolidating Act of 1948), which implemented most of the recommendations of the Cohen Report. The similarities as well as the contrasts between the legislation of Illinois and that of Great Britain are striking.

Most striking, in the first place, are the differences in legislative technique. A British lawyer is unfamiliar with the useful legal conception of a "not for profit" corporation. The institution itself, of course, exists, or rather, the functions fulfilled by the Illinois institution of that name are, in Britain, performed by a variety of forms of association. Readers of Maitland's classical essay on "Trust and Corporation" know that in England the trust concept, and in particular, the charitable trust, had to fill the gap left in English law by the absence of a corporation law sufficiently adaptable to supply the needs of those desirous of dedicating funds for educational, religious, and other charitable purposes. Many of those associations which, one imagines, are organized in Illinois under the General Not for Profit Corporation Act would in Britain take the form of Friendly Societies or of Trade Unions the property of which is administered by trustees and which are not corporations in the full sense. There is, however, also a species of company, known as the company limited by guarantee, whose members make no contribution to the corporate funds while the corporation is a going concern, and which is widely used for purely cultural purposes. This form of corporation is governed, with a number of modifications, by the provisions applicable to the business corporation, and in a sense, therefore, British law attempts to cover both the profit-making and the non-profit-making company by the same statute. On the continent of Europe, on the other hand, the non-profit-making corporation is a separate

[1] Command Paper 6659. [2] 10 & 11 Geo. VI, c. 47 (1947).

and long-established institution. The law of Illinois is, therefore, in this respect, closer to the Continental than to the English legal tradition. The present writer has felt for a long time that the British guarantee company was an artificial product of a fortuitous development, and that it was a somewhat Procrustean undertaking to regulate charitable institutions by provisions destined to serve the needs of the business community. He believes that the method adopted in Illinois is superior from the legislative point of view.

There is one further matter of legislative technique which shows that, in some respects, American corporation law is closer to Continental than to English ideas. A British lawyer expects to find in a companies or corporation statute those provisions which are intended to protect the potential investor against misrepresentation of the company's affairs—particularly the law governing prospectuses, their minimum content, and the liability, both civil and criminal, for omissions and misstatements in a prospectus, offer for sale, or other document inviting subscriptions for shares or bonds. From a strictly systematic and logical point of view this is not, or ought not to be, a matter of company law at all, but it appears in the British Companies Act and was one of the major topics discussed by the Cohen Committee with the result that the new Companies Act contains a reform of what an American lawyer would expect to find in a securities and exchange rather than in a corporation statute. The reasons for this divergence in legislative development became clear to the reviewer when he read the excellent annotations to Section 16 of the Illinois Act of 1933. There does not appear to have occurred in Illinois any incident comparable to the regrettable decision of the House of Lords in *Derry v. Peek*,[3] which made it practically impossible for the subscriber to shares or debentures to recover damages for fraud at common law and which made it necessary for Parliament to amend company legislation almost at once. Thus the law of prospectuses, both in its positive and in its negative aspect, has remained part of Company Law in Britain, while in the United States security and exchange legislation has been allowed to go its own way, both in federal and in state law.

From the point of view of a European lawyer much the most interesting and also the most puzzling provisions of the Illinois statute of 1933 are those which refer to voting rights and those which regulate the capital structure of business corporations, especially with regard to shares of no par value.

A British company is perfectly free to create different classes of shares with multiple voting powers, with limited voting powers, or without any voting rights at all. This course is not, apparently, open to an Illinois corporation.[4] The rule "one share—one vote" is, it seems, embodied in the Act as a compulsory principle, although the state constitution enforces this principle only with respect to votes at elections. One would like to know whether in practice the difference is as great as it appears to be on paper. There is, apparently, no obstacle to the creation of different classes of shares with different par values, though Section 15 seems to prohibit differentiation in this respect between various series of the same class. If the corporation wishes to distribute voting power unequally among the stockholders, can it not do so by the simple device of issuing $1,000 shares in one class and $10 shares in another, thus in effect giving 100 times the voting power to members of the latter class compared with the former? If

[3] [1889] 14 A.C. 337.

[4] Illinois Business Corporation Act of 1933, §§ 14, 28, Ill. Rev. Stat. (1947) c. 32, §§ 157.14, 157.28.

this is so, what is the practical utility of paying lip service to "shareholders' democracy" through provisions such as those in Sections 14 and 28? More than that: Is there anything inherently wrong in the unequal distribution of voting power? Is not the phrase "shareholders' democracy" almost a contradiction in terms? Where voting is by heads, equality may be an ethical or a political postulate, but par values of shares, unlike human beings, are not born equal. It is, without any closer knowledge of the law of Illinois, at first sight not easy to see why the principle of equality should have been embedded in the Business Corporation Act but excluded from the Not for Profit Act.[5]

The Cohen Committee examined the question of whether shares of no par value should be introduced in Britain and arrived at a negative conclusion. The argument in favor was that the ignorant might be misled by a "nominal value which bears no relation to the real value of the share." But the Committee felt that the opportunity given by this class of share "to the unscrupulous to manipulate accounts" could "be defeated only by a series of elaborate provisions the substantial effect of which would be to re-introduce a capital account and, with it, most of the same complications which the no par value share was designed to avoid." The Report mentions the need for "provisions as to the price at which shares might be issued and as to the extent to which money received by the company in payment of the shares might be treated as a distributable surplus, not as capital, and used accordingly." The Illinois Act of 1933 shows that the existence of no par value shares confronts the legislative draftsman with a problem of almost unrivaled complexity. In the absence of shares of this type it is comparatively simple to give effect to the basic principle of the "guaranteed minimum of assets" which must be available for the security of the creditors against premature distributions to shareholders: The minimum is determined by the sum total of the nominal share capital and, in addition, of such reserves as are prescribed by law. No such simple solution is possible where the law permits the creation of stock of no par value, and the rule that dividends must not be paid out of capital becomes involved in a maze of technicalities. True, the lucid annotations to Sections 2, 6, 19, and 41 enable the reader to grasp the meaning of terms such as "stated capital" and "paid-in surplus" in the law of Illinois. Nevertheless, an outsider may be forgiven if he wonders whether the institution of no par value shares is sufficiently valuable to justify a system of legal concepts which makes the simple difference between non-distributable capital and distributable surplus vanish into the thin air of higher mathematics. On the other hand, a British lawyer is inclined to look with envy at the terse and simple formula[6] which the legislature of Illinois has used to cut the Gordian knot of unrealized accretions to fixed capital assets. Here the English courts have created unnecessary complications and an entanglement between the lawyers and the accountants which has been happily avoided in the state of Illinois. The purchase by a company of its own shares is no problem from the British point of view. A British company is absolutely debarred from acquiring its own shares (redeemable preference shares apart), not indeed by statute, but by the decision of the House of Lords in *Trevor v. Whitworth*,[7] which decided that the practice was incompatible with the very nature of a joint stock company.

[5] Illinois General Not for Profit Corporation Act of 1943, § 15, Ill. Rev. Stat. (1947) c. 32, § 164 (a)(14).

[6] Ill. Rev. Stat. (1947) c. 32, § 157.41(c).

[7] [1887] 12 A.C. 409.

It would be interesting to know how the provisions concerning the issue of shares for a consideration other than cash[8] operate in practice. There does not appear to be anything to compel the directors to give publicity to such transactions and, in particular, to inform the public, the stockholders, and the creditors on what basis the consideration (including past services) has been assessed. The temptation to "water" stock must, in such circumstances, become almost irresistible. On the other hand, it appears from the annotations to Section 18 that the courts of Illinois have been more alive to this danger than the English courts and that they have been less narrow in interpreting the meaning of "fraud" in this connection. Even so, compared with some Continental legal systems, neither Illinois nor English law can be said to go far enough in protecting the public against a very real danger. The reviewer believes that the "subjective" or "bona fide" test adopted in both systems, but rejected in other American jurisdictions, is inadequate.

To a British reader the question of ultra vires is of particular interest at the present moment. The Cohen Committee had recommended abolishment of the ultra vires doctrine in Britain and conversion of the provisions in the constitutions of the companies which define their objects into a purely contractual term operating solely between the corporation and its members. Had this desirable reform been carried into effect, there would have been the closest resemblance in this respect between British law and the law of Illinois.[9] Unfortunately the Government did not see its way to embody this proposal in the bill, but Parliament found a way out of the difficulty, and emasculated the ultra vires doctrine by providing that the corporate powers can be enlarged in all of the more important cases by a resolution of the shareholders passed by a three-fourths majority. Certain minority and creditor groups may apply to the court for a cancellation of the alteration, but, if they fail to do so within three weeks, the validity of the alteration can no longer be questioned by anyone.[10] This, in the reviewer's opinion, is no more than a "second best," and the Illinois solution of the problem appears to him to be far superior. He would submit that the provisions of the law of Illinois have preserved all that is worth preserving of the ultra vires doctrine. The doctrine is unknown on the continent of Europe, and its absence does not appear to have had any untoward effects. It is difficult to assign any reasons of either justice or business convenience to the doctrine, and its continued existence in the Anglo-Saxon world can be explained only as a relic of the peculiar history of the corporate entity concept in the Anglo-American common law.

Many other aspects of the statutes which are especially noteworthy to the European lawyer can only be mentioned in passing. Section 50 of the Act of 1933 which makes full payment of the shares a pre-condition for the commencement of business does not appear to distinguish between the corporation which appeals to the public for subscriptions and the "family business" which does not. Much may be said for this, but the absence of any differentiation in this, as in other respects, between what in Britain is known as the "private company" and what British law calls the "public company" is a striking characteristic of the legislation of Illinois. So is the absence of provisions for the investigation of a corporation's affairs by a government agency, comparable to

[8] Ill. Rev. Stat. (1947) c. 32, §§ 157.17, 157.18.

[9] Illinois Business Corporation Act of 1933, § 8, Ill. Rev. Stat. (1947) c. 32, § 157.8. Illinois General Not for Profit Corporation Act of 1943, § 6, Ill. Rev. Stat. (1947) c. 32, § 163 (a)(5).

[10] Companies Act of 1948, § 5, 10 & 11 Geo. VI, c. 47, § 5 (1947).

the elaborate rules on investigations by the Board of Trade in Britain. On the other hand, even the restricted right of stockholders[11] to inspect the books of the corporation looks very far-reaching to a European reader. The constitution-making power of the board of directors[12] is another institution unusual anywhere in Europe.

It is difficult, if not impossible, to form a considered opinion of a law which one has not seen in practical operation. If the reviewer has had the temerity to comment on the corporation legislation of a state situated many thousands of miles from his own country, his excuse must be the excellence of the work he was given for review. After many hours spent on perusing these volumes he was almost under the illusion that he was writing by the banks of Lake Michigan and not by those of the Thames. No greater praise can be bestowed on a legal work than that it depicts the law as a living organism and not as an agglomeration of dead pieces of machinery.

O. KAHN-FREUND*

Preliminary Draft of a World Constitution. By the Committee To Frame a World Constitution: Robert M. Hutchins, G. A. Borgese, and others. Chicago: The University of Chicago Press, 1948. Pp. xii, 92. $2.00.

At Grinnell not long ago, the discussion of the various schemes for the establishment of the universal reign of law became so heated as to call forth the public rebuke of the president of the college. Such heat no doubt has its bad side; but it also has its good side. Without such heat, no great revolution was ever accomplished. Patriots like Patrick Henry and Samuel Adams were men of burning passion. They precipitated the American Revolution. They were not the builders of the Constitution, but without them there might never have been a Constitution. So, if we are to have a World Constitution today we must have a fiery zeal comparable to that of those early patriots. It must be a zeal that stirs the whole country and makes itself felt in the realms of power. It must be a missionary zeal not confined to the negative hatred of war but rather imbued with the positive ideal of the dignity of man. Such a zeal shows through the lines of this Preliminary Draft. The final constitution may be very different but it is zeal such as is evident here that will make that constitution possible.

The Preliminary Draft is not a lawyer's document, nor is it fundamentally an American document. Its philosophy is that of the classics and of the Continent rather than that of one steeped in American Constitutional and International Law. Perhaps that is no great objection. All that anyone can rightly ask is: Will it work? A possible answer to this is that the American and British models of government have worked better than most others.

The draft, however, is not without its American aspects. It provides for a federal form of government, for the judicial review of unconstitutional legislation. It contains a Bill of Rights. All this is to the good. A world government which does not reach the individual amounts only to a league. Leagues are secondary and temporary and essentially negative. They are inadequate for the protection of private rights. And without the power in the courts to declare legislation unconstitutional, there would be no ade-

[11] Illinois Business Corporation Act of 1933, § 45, Ill. Rev. Stat. (1947), c. 32, § 157.45.

[12] Illinois Business Corporation Act of 1933, § 25, Ill. Rev. Stat. (1947) c. 32, § 157.25.

* London School of Economics and Political Science (University of London).

quate safeguard that the Constitution would be respected or the freedom of the individual secured. Without a Bill of Rights, a fundamental objective of the Constitution, the realization of the dignity of man would not have visual expression.

A possible criticism of the particular form of federalism proposed is that it is based on regional groupings which do not now exist, instead of on existing national states. If we were working in a vacuum this would be very well. Intense nationalism has been a breeder of wars and has been so permeated with extreme concepts of national sovereignty as to make the subordination of those national states to the world state a matter of difficulty. Could these national states be made to fit into a world state except in the very subordinate way that the draft contemplates? The draft would not wipe out national boundaries but would build the federal structure on the foundation of the regional groups. Fortunately, or unfortunately, we are not working in a vacuum. As President Cleveland once said, "It is a condition and not a theory that confronts us." We have the national states. We do not have these regional groupings. We must build with the material we have, or we shall not build at all. The task will be difficult enough to get the existing national states to surrender certain of their sovereign powers without making them, by a self-denying ordinance, relegate themselves to the position of municipal corporations. Existing loyalties are too dear to too many to be hastily brushed aside.

The draft provides for a President, but he is to be a President rather on the order of the President of the third French Republic. He is to be an outstanding citizen of the world, like Gandhi. He is to be chairman of the Supreme Court and Protector of the Peace. He is thus to be the symbol of law and order, just as the King of Great Britain is the symbol of the unity of the British Commonwealth; and, like the latter, he is not to be a great governing force. The political leader is to be the Chancellor, who in turn is responsible to the Council.[1] In other words, the government is presidential in form but parliamentary in fact. The great success of parliamentary government in Great Britain no doubt has been responsible for this choice. Elsewhere the parliamentary system has not worked so well. A prerequisite for its success would seem to be two major parties. Where the legislature is made up of a number of blocs, the changes are kaleidoscopic. With the changing combinations, continuity of policy is difficult and a long-range program unlikely. To meet this objection, a Planning Agency is provided for, but it will be the Council that holds the power and not the Agency. The chance of there being two well-knit world parties is not great. Rather one would anticipate blocs on a scale hitherto unknown.

The importance of a reign of law is emphasized by the creation of a Grand Tribunal of sixty justices, assigned equally to five benches. One representative from each of these benches together with the President of the Republic as chairman and the Chairman of the Council as vice-chairman shall constitute the Supreme Court. These two ex officio members might well be lawyers, but often they would not be. In such a case, they would add a lay element to the court that might be freshening but is somewhat startling. It is a far cry from any doctrine of the separation of powers. The creation of the five benches would anticipate a vast amount of legal work and provide ground for jurisdictional disputes which might well take up much of the time of the Supreme Court.

[1] He is also responsible to the President, but the Council would seem to be the dominant political power; and on the principle that no one can serve two masters, it would seem that the Council would prevail.

The outstanding contribution from Rome is the creation of the Tribune of the People as a spokesman for the minorities. Care is taken that he shall be an outstanding man and yet not represent the majority in power.

The Chamber of Guardians, with the President of the Republic as its chairman and six other guardians elected by the Council and the Grand Tribunal from among the Council for terms of three years, controls the armed forces of the Republic.

Legislative power is in the hands of the Council consisting of ninety-nine members, nine from each of the nine regional groups and eighteen chosen at large. It is a unicameral legislature.

The Federal Convention is the one body elected directly by the people of the world, with one delegate for each million of population or major fraction thereof, with special provision for states recognized as sovereign in 1945 and ranging between 100,000 and 1,000,000. The functions of the Convention are largely constitutional and electoral. It is to meet every third year for a session of thirty days. The preponderance which heavily populated areas like India and China would have on the basis of population alone is overcome by the fact that in the Council, where legislative power lies, the nine regions are equally represented except for the eighteen delegates-at-large.

These few words do scant justice to a work of great industry, devotion, and ingenuity. In so far as it builds in a vacuum instead of on existing foundations and after successful models, it labors under great handicaps. But it labors in a great cause, and no one knows what the acceptable solution will be. For solution there must be, or the world which we know will perish.

PERCY BORDWELL*

* Professor of Law, The State University of Iowa.